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BRIEF FOR PETITIONER AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED
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No. 13,553

SIDNEY W. WILSON,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR THE REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

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STATEMENT OF QUESTION PRESENTED

The parties to this proceeding by prehearing conference stipulation filed herein and approved by Order of this Court dated November 14, 1956, have stipulated the single issue of this proceeding to be as follows:

Whether, in circumstances in which the Civil Aeronautics Board does not find the pilot to be unqualified to fly, the Board is empowered under Section 609 of the Civil Aeronautics Act to suspend his airman certificate as a deterrent sanction (J. A. 1).

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 13,553

SIDNEY W. WILSON,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent

PETITION FOR THE REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

This is a petition to review "Supplemental Opinion and Order on Reconsideration" issued by respondent, Civil Aeronautics Board, on July 31, 1956 (S-754) (J.A. 32-38) and "Order Denying Petition for Reconsideration" issued by respondent on August 9, 1956 (S-757) (J.A. 41-43). The jurisdiction of this Court is invoked under Section 1006 of the Civil Aeronautics Act of 1938, as amended, (52 Stat. 1024, 49 U.S.C.A. 646), under which this Court has jurisdiction to review any order, affirmative or negative, issued by the Civil Aeronautics Board. It seeks review of final orders of the Civil Aeronautics Board entered in proceedings under Section 609 of said Act (52 Stat. 1011, 49 U.S.C.A. 559) dealing with, among other things, the amendment, suspension and revocation of airman certificates. The Petition for

Judicial Review was filed in this Court within 60 days after the entry of the Board's Orders herein complained of, in accordance with the requirements of Section 1006(a) and (b) of said Act.

As the respondent in the proceeding below, the petitioner herein has a "substantial interest" in the orders of which review is sought, within the meaning of Section 1006(a) of said Act.

STATEMENT OF THE CASE

On December 31, 1954, the Administrator of Civil Aeronautics filed a complaint charging the petitioner with certain violations of the Civil Air Regulations and seeking a suspension of his airline transport pilot certificate (J.A. 3-4). Petitioner duly filed his answer denying the violations charged. Thereafter, a hearing was held before an Examiner of the Civil Aeronautics Board, who issued his Initial Decision (J.A. 5-22), in which he found that on July 6, 1954, petitioner, while in command of a National Airlines' DC-6B in scheduled air transportation, after having been cleared for an instrument approach to Runway 28 at the Greater Pittsburgh Airport, Pittsburgh, Pennsylvania, and making such approach without landing, (a) violated Sections 40.364 and 60.46 of the Civil Air Regulations by failing to execute the prescribed missed approach procedure for that runway, (b) violated Section 60.47 of such regulations by failing to insure the maintenance of a continuous radio watch on the appropriate frequency, (c) violated Section 60.12 of said regulations in that the aforesaid failures constituted operation of the aircraft in a careless manner endangering lives and property, and (d) failed to exercise the degree of care, caution, and judgment required of a holder of an airline transport pilot rating. The Examiner further found, however, that suspension of petitioner's airline transport rating, in view of petitioner's good flying record before and since the violations charged, would serve no useful purpose and that the public interest did not require any remedial action. Upon an appeal by both parties, the respondent,

Civil Aeronautics Board, issued its opinion under date of March 28, 1956, agreeing in substance with the Examiner's findings of violations and also with his decision not to suspend petitioner's airline transport pilot certificate (J.A. 22-31).

Thereafter, both parties to the proceeding filed petitions seeking reconsideration by respondent Board of its decision dated March 28, 1956. On July 31, 1956, respondent entered its "Supplemental Opinion and Order on Reconsideration" wherein respondent (Vice-Chairman Adams concurring and dissenting) (J.A. 38) reaffirmed its earlier decision that petitioner had violated the Civil Air Regulations, as aforesaid, but reversed that portion of its earlier decision which imposed no suspension of petitioner's airline transport pilot certificate (J.A. 32-38). In its said "Supplemental Opinion and Order on Reconsideration" the respondent ordered that petitioner's said certificate be suspended effective August 10, 1956, through August 19, 1956 (J.A. 37). The suspension so ordered was based upon the respondent's conclusion that, in the public interest, it should so suspend the petitioner's said certificate as a "deterrent sanction" (J.A. 36).

On August 7, 1956, petitioner filed a petition for reconsideration of said Supplemental Opinion and Order on the ground that in issuing said Order suspending petitioner's airline transport pilot certificate as a punitive or deterrent sanction, the respondent had exceeded its statutory powers (J.A. 38-40). Petitioner further sought a stay of execution thereof to enable him to petition this Court for judicial review. On August 9, 1956, respondent issued its Order by which it denied the petition for reconsideration but granted an appropriate stay pending judicial review by this Court (J.A. 41-43).

STATUTES INVOLVED

The principal provisions of the Civil Aeronautics Act here involved are set forth below. Other pertinent statutory provisions are cited or quoted in their appropriate place in the text of this brief.

The Civil Aeronautics Act of 1938 (52 Stat. 973) as amended, (49 U.S.C.A. 401 et seq.), provides in part:

Sec. 609. (52 Stat. 1011, 49 U.S.C.A. 559)

"The Board may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate . . . ."

Sec. 901 (52 Stat. 1015, 49 U.S.C.A. 621)

"(a) Any person who violates (1) any provision of subchapters V, VI, and VII of this chapter, or any provision of subsection (a) (1) of section 181 of this title, or (2) any rule or regulation issued by the Postmaster General under this chapter, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Board or the Postmaster General, as the case may be . . . ."

"(b) In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty . . . ."

Sec. 903 (52 Stat. 1017, 49 U.S.C.A. 623)

"(b) (1) Any civil penalty imposed under this chapter may be collected by proceedings in personam against the person subject to the penalty . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be re-examined other than in accordance with the rules of the common law . . . ."

Sec. 1006 (52 Stat. 1024, 49 U.S.C.A. 646)

"(a) Any order, affirmative or negative, issued by the Board under this chapter . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order . . ."

STATEMENT OF POINTS

The respondent, Civil Aeronautics Board, erred:

(1) In holding by its Supplemental Opinion and Order dated July 31, 1956 that petitioner's airline transport pilot certificate should be suspended for a 10-day period as a deterrent sanction against petitioner.

(2) In reaffirming statutory power to so suspend petitioner's certificate as a deterrent sanction by Order Denying Petition for Reconsideration dated August 9, 1956.

SUMMARY OF ARGUMENT

The proceedings which resulted in the punitive orders herein complained of were conducted solely under Section 609 of the Civil Aeronautics Act of 1938 by the terms of which Congress has granted to the Civil Aeronautics Board remedial powers in the public interest to inquire into fitness and qualifications of holders of aviation certificates issued under the Act, and where such holders are found deficient in fitness or qualification, the Board may suspend their certificates. No power is expressly granted to the Board to punish the holder of a certificate for a violation of the Act, nor may such power be implied under the clear remedial wording of Section 609. The legislative delegation of power to punish any violations of the Act is contained exclusively in entirely different sections of the Act not availed of here by the Board. The construction of the statute urged by petitioner is not only supported by sound and established principles of statutory construction, but by an examination and comparison of important comparable statutes in related fields of government regulatory licensing. The Board's interpretation of its power to punish under Section 609 results in a deprivation of a certificate holder's right to trial by jury expressly provided for under the penalty sections of the Act.

ARGUMENT

I.

Introductory

On June 23, 1938, the Congress of the United States proclaimed the following statement of policy:

> "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States." Civil Aeronautics Act of 1938, Section 3, 52 Stat. 980, 49 U.S.C.A. 403.

Occasionally, as in this case, those charged by that same Congress with the duty of reasonably regulating our citizens' exercise of such right of freedom of transit tend to forget that it existed before the statute under which they are empowered to operate. Of course, an activity such as aviation, in the interests of all, must be subjected to reasonable regulation. But, in thus recognizing the citizen's right of freedom of transit in air commerce at the very outset of its regulatory statute, Congress has warned that a strict construction in favor of the right should be favored. Such right, therefore, should be regulated no further than the statutory language clearly and convincingly indicates.

However, the respondent has read its statutory powers with a liberal eye and attempted to deprive petitioner of his right to fly through the exercise of an assumed power to punish him under a non-penal section of the statute. It will be the purpose of this brief to demonstrate the impropriety of respondent's action.

II.

The respondent's Supplemental Order of July 31, 1956, constitutes an attempt to exercise penal powers under a remedial statute.

At the outset it is important to note that the action taken by the respondent in suspending petitioner's airline transport pilot rating is designed purely and simply to punish him for a violation of the Civil Air Regulations and is not a remedial action designed to protect the public from an incompetent or unqualified pilot.

It is not believed that this statement is, or can be, disputed by respondent. At no time in the proceeding have petitioner's competency and qualifications as an airline pilot been drawn into question, and the issue before this Court, as stipulated by the parties, so recognizes.

Also, in its original opinion of March 28, 1956, (J.A. 29-30), the respondent said:

> "As the Examiner noted, respondent who is 37 years of age and married, has been flying since 1936 and had accumulated a total of over 10,000 hours flying time in early 1955. He has been flying for National Airlines for over nine years, with many hours in DC-4, DC-6B, and DC-7 aircraft and substantial instrument time, and he has continued to fly for National during a period of fifteen months from the time of the violations to the issuance of the Initial Decision herein. Thus respondent appears to have a long, clear flying record, continuing for twenty years throughout his adult life, a fact which tends to minimize the likelihood that additional disciplinary measures are needed to deter him from similar acts in the future.
>
> "The nature of respondent's violations, which have previously been described in detail, require little further elaboration. Suffice it that while respondent's violations were clearly more than technical and involved regulations which are highly important to air safety, his conduct under the circumstances (referred to in a footnote as being the communication to petitioner of 'inaccurate current airport weather') did not involve any special or aggravating element of flagrancy or recklessness sufficient to dictate suspension regardless of the other factors discussed herein. Moreover, our decision not to impose a punitive suspension on respondent is not inconsistent with past practice." (Underscoring Supplied)

The respondent's "decision not to impose a punitive suspension" was changed in its Supplemental Opinion and Order on Reconsideration dated July 31, 1956 so as to impose on petitioner a punitive suspension of his airman certificate for a 10-day period, which action respondent referred to in its Supplemental Opinion as a "deterrent sanction." (J.A. 36). The latter phrase is merely descriptive language for a punitive suspension as has been clearly recognized by respondent itself in its earlier decision in the cases of Lewis H. Brubaker and Charles E. Olsen, CAB Dockets Nos. SR-2168, 2169, entered August 2, 1954. In that opinion the respondent held:

> "We are inclined to the view, and hold, that suspensions imposed merely to prevent and deter violations, and where requalification in one or more respects is not involved, are punitive in the constitutional sense, and are a type of 'penalty' from which immunity is provided by Section 1004(i)."

When the Brubaker and Olsen cases were appealed to this Court in Lee, Administrator of Civil Aeronautics v. Civil Aeronautics Board, 96 U.S. App. D.C. 299, 225 F. 2d 950 (1955), the respondent in its brief stresses again and again that a suspension of a pilot's license for violation of the Civil Air Regulations, where the holder's qualifications are not at issue, is purely punitive in nature, and summarizes its position by saying:

> "A punitive suspension plainly is a penalty both in law and practical effect." Brief for Respondent, p. 22, in Lee v. Civil Aeronautics Board, supra.

Finally, in this Court's decision in that case, Judge Prettyman filed a separate opinion (dissenting on another issue) in which he clearly recognized that a suspension unrelated to pilot qualifications constitutes a penalty. At page 302 of 96 U.S. App. D.C., Judge Prettyman stated as follows:

> "The question, then, is whether the proceeding is punitive or merely remedial. In this connection we go to the Fifth Amendment cases. Any reading of the complaint shows the action prayed is purely punitive. The complaint says baldly that the men were careless and therefore ought to be suspended. It does not allege the pilots to be unqualified. I think they were protected by reason of their testimony taken in the investigation." (Underscoring Supplied)

See, also, Brown v. Civil Aeronautics Authority, 112 F. 2d 737 (CCA, 9th)(1940). There the Court plainly indicated that a suspension imposed solely because of violations would constitute a penalty against the pilot justifying the issuance of a supersedeas on appeal. But since the administrative order required the pilot to take a written examination for the purpose of determining his fitness to fly, the Court considered that the "safety of the public" was involved and a supersedeas was denied.

In the present case, as Judge Prettyman noted in the Brubaker and Olsen cases, supra, "any reading of the complaint shows the action prayed is purely punitive." In this respect the complaints in the two cases are indistinguishable. (See the Complaint herein, J.A. 3-4).

This Court has also stated in cases involving suspension of the right to deal in rationed commodities that "the question turned on whether the Board's order is in fact a penalty, i.e., a means and method of punishment of an offender against its rules." Nelson v. B. Simon Hardware Co., 79 App. D.C. 250, 251, 145 F. 2d 386 (1944). In L. P. Steuart & Bro. v. Bowles, 78 App. D.C. 350, 351, 140 F. 2d 703 (1944), the Court said that "a penalty is a punishment, an injury inflicted for punitive purposes." The suspension in that case was held not to be penal because it protected the public by allocating fuel oil away from a dealer disposed to violate the ration program into channels through which it would be distributed in a lawful manner, thus insuring the equitable distribution of a rationed commodity. The United States Supreme Court affirmed in 322 U.S. 398 but indicated that had the suspension order been penal rather than remedial, the result would be different. Mr. Justice Douglas stated for the Court at 322 U.S. 404, as follows:

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. (Citing cases) Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record."

Since the foregoing demonstrates the punitive nature of respondent's Supplemental Order in this case, detailed consideration will now be given to the statutory provision from which respondent purports to derive such penal powers.

III.

Section 609, Civil Aeronautics Act of 1938, as amended, is purely a remedial statute, and a careful consideration of its wording and purpose discloses no power to punish.

The respondent's power to suspend an airman certificate is contained in Section 609 of the Act, which reads, in pertinent part, as follows:

> "The Board may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or suspend, in whole or in part, any type certificate, production certificate, air-worthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate . . ." Act of June 23, 1938, c. 601, Title VI, Sec. 609, 52 Stat. 1011, 49 U.S.C.A. 559.

This section of the Act falls within Subchapter VI entitled "Civil Aeronautics Safety Regulations," and obviously Section 609 is designed specifically to enable respondent Board, as a remedial matter, to "reinspect" aircraft and their components and "reexamine" the competency of airmen and thereafter, where the public interest so requires, to alter, amend, modify, suspend and revoke certificates previously issued under powers granted in preceding sections. No power is specifically delegated under Section 609 to punish an airman, air carrier, aircraft, etc. Clearly, no such punishment power will be implied. Wallace v. Cutten, 298 U.S. 229 (1936); Iselin v. United States, 270 U.S. 245 (1926). A fortiori is this true, where not even

a casus omissus is involved, for Congress specifically provided penalties for violations of the Act in an entirely separate title labeled "Subchapter IX-Penalties," hereinafter discussed. [1]

Furthermore, this Court in a professional license case long ago established that any statute pertaining to the exercise of a trade or profession must be strictly construed in favor of the citizen. Lockwood v. District of Columbia, 24 App. D.C. 569 (1905), where Mr. Chief Justice Shepard wrote:

> "The established rule of the courts is that all statutes imposing restrictions upon business or the common occupations of the people, or levying a tax upon them, are to be construed strictly."

In contrast, the respondent, in using Section 609 as a punishment device, has endeavored to give the statute a liberal and distorted interpretation far beyond its obvious intendment.

Research by counsel into the legislative history of the Civil Aeronautics Act of 1938 has failed to disclose any significant comment either in the Committee Reports or the Hearings which might be specifically helpful in construing the provisions of the Act here under construction. However, it is well known that the late Senator Pat McCarran was one of the most active legislators in the 1938 revisions of the country's aviation laws. On January 5, 1938, he introduced in the Senate a bill, S. 2, 75th Cong., 3d Sess., in which Section 276 (d) dealing with suspension and revocation of aircraft, airman and related certificates, read as follows:

---

[1] Even had there been a legislative inadvertence in the present statute, United States v. Weitzel, 246 U.S. 533 (1917) warns us that the judiciary must not supply the omission simply "because the court thinks the legislature should have made them (the statutes) more comprehensive." 246 U.S. 543.

> "(d). The Authority may amend or modify any certificate or license issued under this part; and may suspend or revoke any such certificate or license when the holder thereof fails to comply with the provisions of this Part, or the orders, rules, regulations, or requirements of the Authority thereunder, or the terms and conditions of the certificate or license." (Underscoring Supplied)

S. 2 never passed the Congress, having been apparently superseded by the slightly later bill which became the present Act. It is believed noteworthy to observe, however, that in contrast to the language of Section 609, the language of the abortive bill quoted above contains words indicating power to punish through suspension or revocation upon failure to comply with the regulations of the Authority. It is a fair inference, therefore, that Congress preferred the present statutory scheme where remedial provisions are contained in one place (Subchapter VI, including Sec. 609) and punishment provisions in another (Subchapter IX).

Finally, it is important to consider the purpose of Section 609. Bearing in mind constantly that the section is a part of the Subchapter dealing only with the respondent's power and duty "to promote safety of flight" (Sec. 601), and that penalties for violation of the Act are fully provided in another Subchapter, it becomes obvious that the power conferred by Section 609 is solely remedial, e.g., the certificate of a defective aircraft or air navigation facility may be suspended in the interests of safety until the defects are corrected, or if they cannot be corrected, then the certificate may be altered or modified so as to restrict the freedom of its operation; the airman certificate of a pilot who, on reexamination, has been found to have a visual deficiency may be altered so as to require the wearing of correcting lenses while flying aircraft; or the certificate may be suspended where it is found that the holder is presently unqualified in piloting techniques until he has proven his attainment of suitable proficiency.

Of course, these examples are merely illustrative and can be multiplied many fold, but in nc event can the power to punish be found in the wording.

The phrase "reexamine any airman" seems clear and unambiguous. No dictionary definition need be cited to demonstrate that "reexamine" means to "examine again." Examine for what again? The answer to that question depends upon an analysis of the reason for the first examination of the airman.

When petitioner obtained his airline transport pilot certificate, such first examination consisted of his proving compliance with the minimum requirements set forth by respondent in its Civil Air Regulations, Part 21.[2] These requirements set minimums with respect to age, character, citizenship, education, aeronautical knowledge, experience, and skill, and radio skill. In short, they deal exclusively with qualifications as an airline pilot, not a single one of which has been the subject of respondent's orders in this case. And yet by the plain wording of Section 609, the respondent's right to suspend stems solely from the power to "reexamine." Respondent has reexamined petitioner and has not found him unqualified in any respect to hold the rating for which he was originally examined.

But it has found that he violated certain provisions of the regulations, and despite the availability of the penalty provisions of the Act, respondent nonetheless has ordered that petitioner be punished for such violations by a 10-day suspension of his certificate. Such action meets neither the letter nor the spirit of Section 609, and constitutes an assumption of power not delegated by Congress. Yet it is beyond question

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[2] If it be objected that such examination is actually conducted under the supervision of the Administrator, yet under respondent's own interpretation of the Reorganization Plans of 1940, in safety matters the Administrator "is bound by the rules of the Board." See Respondent's Brief, p. 14, in Lee v. Civil Aeronautics Board, supra.

that an administrative agency may not exercise a power which the statute does not grant to it. Hannegan v. Esquire, Inc., 327 U.S. 146 (1945); Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433 (1911).

At pages 23-24 of its brief to this Court in Lee v. Civil Aeronautics Board, supra, respondent makes the following distinction:

> "The statute (Sec. 609) sharply distinguishes between revocation and suspension. . . Revocation thus is for causes relating to qualification to fly, and is the sanction 'characteristically free of the punitive criminal element' recognized in Helvering (303 U.S. at p. 399).
>
> "On the other hand, suspension is not so limited, but may be imposed where the 'interest of the public so requires' . . . This standard obviously embraces both remedial and punitive action."

However, the respondent in making this distinction and claiming a punishment power under Section 609 has overlooked other important words of the statute. The power granted by Section 609 in cases where "the interest of the public so requires" is not simply to "suspend." It is a power to "alter, amend, modify or suspend."

Thus, if respondent is correct in asserting a power to punish an airman by suspending his certificate for a period of time, it could likewise punish him by altering, amending or modifying his certificate. For example, an airline pilot admittedly competent and qualified in all respects, but who in some way had infringed a provision of the voluminous regulations, could be punished, under respondent's theory, by merely altering or modifying his airman certificate so as to remove therefrom his instrument rating or his rating for particular aircraft used by his employer. In either event, such action would destroy his means of livelihood as an airline pilot even though under his altered airman certificate he could still pilot aircraft for other purposes. Surely it cannot be gainsaid that Congress intended no such possible

result to flow from the remedial wording of Section 609. Yet respondent's theory of its power to punish under that section leads inexorably to this fantastic result which is so at war with the statute as a whole. If the respondent feels that punishment of an airman is warranted under any given set of facts, then as Congress clearly intended, the appropriate steps should be taken under Subchapter IX of the Act denominated "Penalties".

IV.

The punishment powers under the Act are contained in Subchapter IX thereof, and a comparison of related statutes shows that Congress must have intended such expressed punishment powers to be exclusive.

(a) Subchapter IX of the Act.

If Congress had overlooked the imposition of sanctions against violators of the Act, there might be some merit in respondent's claim of a power to punish in the public interest by penal suspension. Cf., however, Wallace v. Cutten, supra. But clearly Congress cannot be accused of any such oversight or inadvertence.

On the contrary, Congress carefully conferred punishment powers in that part of the Act denominated "Subchapter IX-Penalties." This subchapter (or "Title" as it was originally called) contains three sections headed "Civil Penalties" (Section 901), "Criminal Penalties" (Section 902), and "Venue and Prosecution of Offenses" (Section 903). In the present case involving the safety provisions of Subchapter VI, only Section 901 dealing with "Civil Penalties" is material to the question, and that section reads, in pertinent part, as follows:

> "(a) Any person who violates (1) any provision of subchapters V, VI, and VII of this chapter, or any provision of subsection (a) (1) of section 181 of this title, or (2) any rule or regulation issued by the Postmaster General under this chapter, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Board or the Postmaster General, as the case may be. . . ."

If respondent feels that in any given case, the violator of its safety regulations should be punished in the public interest and as a deterrent to the violator and others from further violations, then Section 901 in clear and unambiguous language provides the punishment. Here, in contrast to the remedial wording of Section 609, we find the familiar language of punishment. "Any person who violates . . . shall be subject to a civil penalty . . ." is widely divergent in letter and spirit from "The Board may . . . reexamine any airman, and . . . suspend, in whole or in part, any . . . airman certificate . . . if the interest of the public so requires . . ."

Respondent itself, in the past, has seemed clearly to recognize the force of petitioner's contentions. In case after case, where a civil penalty had been previously imposed for violation of the regulations, but where the pilot's qualifications were not at issue, the respondent has dismissed proceedings under Section 609 with no action taken to suspend the offending pilot's airman certificate. See, for example, E. W. Condit, 13 CAB 458; C. T. Willock, 13 CAB 326; C. J. Tindel, 13 CAB 465; Joel Eck, 13 CAB 408; R. S. Jones, 13 CAB 470; Peters, 5 CAB 346; Davis, 5 CAB 183; and J. C. McKenzie, 13 CAB 461. In the McKenzie case, after finding that the pilot had operated his aircraft "in a careless and reckless manner so as to endanger the lives and property of others" and that the pilot had paid a $200 civil penalty, the respondent concludes:

"7. That in view of the above-mentioned civil penalty, the public interest does not require that the Civil Aeronautics Board take any action against respondent's private pilot certificate at this time."

See, further, Reid, 5 CAB 4 where respondent found "serious" violations of the regulations but in view of the pilot's experience and qualifications, it dismissed the complaint and recommended that appropriate steps be taken to impose upon the respondent a civil penalty in an amount commensurate with the gravity of the offenses which he had committed.

Also, on many occasions, the respondent has properly exercised its true remedial powers, without attempting to punish under Section 609, in cases where the facts demonstrated incompetency or lack of flying proficiency of the pilot, and has suspended the airman certificate until such time as the holder had completed additional flight instruction and study and retaken flight tests and written examinations. See, for example, Francis C. Bethell, 13 CAB 28; George Law, 13 CAB 263; Malcolm Riess, 13 CAB 300; Henry Line, 13 CAB 308; Floyd P. Klee, 13 CAB 435; Jack N. Neal, Dkt. No. SR3-1563 (September 10, 1956) and, on like principles, suspending air carrier operating certificates until qualifications proven, Alaska Airlines, Inc., 13 CAB 495; Aviation Corporation of Seattle, 13 CAB 526.

The series of Board actions discussed immediately above demonstrate a proper regard by the tribunal for its limited powers under the statute. But to use its remedial powers of suspension under Section 609 as a weapon solely of punishment is highly improper and violates the most time-honored rules of statutory construction.

Furthermore, with regard to the administrative power over compromise of fines, such as granted to respondent in Section 901 (a), supra, the possibility of abusing the power by a threat of license suspension proceedings has been pointed out by the Attorney General's Committee on Administrative Procedure:

> "The potentiality of abuse is always present as long as permittees dread the mere possibility that suspension proceedings may be instituted. Such fear provides a potent inducement to settle cases, particularly if the compromise figure is so small that it occasions no greater expense than would be involved in the defense of suspension proceedings. The temptation to solicit settlements even of cases where the Administration's case is weak must be almost irresistible under such psychological conditions." Sen. Doc. No. 186, 76th Cong., 3rd Sess. (1940) Part 5, p. 14.

It would certainly seem that any affirmance of the respondent's assertion of power to suspend purely punitively, so that the licensee's proof of competence would be irrelevant, can only serve to increase the in terrorem use of the civil penalties settlement procedures. On the other hand, if the suspension power granted in Section 609 is restricted, as it properly should be, to a reexamination of fitness to exercise his airman rating, the competent pilot need no longer "dread" suspension as a possible double punishment for an alleged violation of the regulations and may devote his energies to defending against the assertion of penalties under Subchapter IX. Such a holding would tend to remove the "temptation" to solicit settlements of "weak" cases which gave concern to the Attorney General's Committee.

(b) Comparison of Important Related Statutes.

A well-known aid to statutory construction is the rule permitting the court to examine other enactments by the same legislature in related fields of government activity for enlightenment as to the legislature's purpose and intent in a statute under construction. See Boston Sand Co. v. United States, 278 U.S. 41 (1928); United States v. C.I.O., 335 U.S. 106 (1947); Einstein v. Sawhill, 2 App. D.C. 10 (1893).

The merchant marine inspection service dating from 1852 represents "perhaps as thorough a system of administrative control as is found anywhere in American legislation." Freund, "Administrative

Powers Over Persons and Property," The Univ. of Chicago Press (1928), pp. 354-5. For many years and long prior to the passage of the Civil Aeronautics Act of 1938, an administrative agency of the United States government [3] has performed the function of issuance, suspension and revocation of licenses and certificates of merchant marine officers and seamen. The present Congressional statute granting these powers was enacted in 1911 [4] and reads, in pertinent part, as follows:

> "In any investigation of acts of incompetency or misconduct or of any act in violation of the provisions of title 52 of the Revised Statutes or of any of the regulations issued thereunder, committed by any licensed officer or any holder of a certificate of service, the person whose conduct is under investigation shall be given reasonable notice of the time, place, and subject of such investigation and an opportunity to be heard in his own defense. The whole record of the testimony received by such investigation and the findings and recommendations shall be forwarded to the Commandant of the Coast Guard, and if that officer shall find that such licensed officer or holder of certificate of service is incompetent or has been guilty of misbehavior, negligence, or unskillfulness, or has endangered life, or has willfully violated any of the provisions of title 52 of the Revised Statutes or any of the regulations issued thereunder, he shall, in a written order reciting said findings, suspend or revoke the license or certificate of service of such officer of holder of such certificate. . . . ." (Underscoring Supplied) R.S. 4450; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167, as amended May 27, 1936, 49 Stat. 1381; 46 U.S.C.A. 239 (g).

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3 It has been variously known as the Steamboat Inspection Service, the Bureau of Navigation, and most recently as the Bureau of Marine Inspection and Navigation. See Monograph of the Attorney General's Committee on Administrative Procedure, Senate Document No. 186, 76th Cong., 3d Sess., Part 10, p. 2. The functions are now performed by the United States Coast Guard.

4 Amendments immaterial to the present discussion have been made, and the Reorganization Plans transferred the enforcement functions to the Coast Guard.

This statute (R.S. 4450) has been quoted in detail solely in order that the Court may have the benefit of reading the type of language employed by Congress when it intends to delegate both remedial and punitive powers. It will be observed that the wording of the merchant marine statute clearly confers the power to punish by suspension or revocation where the administrative agency finds that the licensee "has been guilty of misbehavior, negligence . . . or has willfully violated any of the provisions of title 52. . ." This is in striking contrast to the remedial language of Section 609 where the respondent is only empowered to "reexamine" an airman and to suspend his certificate "if the interest of the public so requires." Since R.S. 4450 long antedated Section 609, the inference is inescapable that had Congress truly intended to delegate punitive power in the later statute, it would have used wording at least comparable to that of its earlier statute. But this Congress did not do. Instead it used strictly remedial language in Section 609 and later conferred penal powers in Sections 901 and 902.

It is significant, also, that R.S. 4450 has been criticized for so combining both remedial and punitive powers. The Attorney General's Committee on Administrative Procedure, which in 1940 made a comprehensive study for the Senate of administrative procedures, had this to say about R.S. 4450:

> "The only sanction provided by statute for punishing offenses of officers and seamen is the suspension or revocation of licenses and certificates. Undoubtedly, this sanction is the proper one for cases involving incompetency . . . The purpose of conferring the power of revocation or suspension of licenses or certificates upon the Bureau was to permit the Bureau to weed out the incompetents." (Underscoring Supplied) Monograph of the Attorney General's Committee on Administrative Procedure, supra, Part 10, p. 20.

The Committee goes on to raise the question of whether in enforcing discipline the "more appropriate sanction" is not the imposition

of fines. It is submitted that Congress answered that question in the affirmative by the statutory scheme employed in the Civil Aeronautics Act of 1938. See Section 901.

Detailed consideration has been given to R.S. 4450 because, so far as counsel have been able to ascertain, it is the "grandfather" statute in this field. It would unduly lengthen this brief to give like consideration to all analogous statutes covering other administrative agencies. It is believed sufficient merely to refer the Court to several of the license suspension and revocation powers granted to other agencies in all of which, unlike Section 609, Congress specifically used language associated with the power to punish for wrongdoing. See, for example, Federal Communications Act, as amended, 47 U.S.C.A. Sec. 303, 48 Stat. 1082 (authority to suspend where licensee has "violated" the Act or regulations, "willfully damaged" radio apparatus, "transmitted false or deceptive signals," etc.); Securities Exchange Act of 1934, 15 U.S.C.A. Sec. 78s, 48 Stat. 898 (power to suspend where licensee has "violated" the Act or regulations.)

Clearly, therefore, if Congress had intended Section 609 should be used by respondent to punish a "violator," it would have used the punishment language found in so many other related statutes.

(c) The statutory right of trial by jury.

In the preceding pages of this brief, we submit it has been established that the suspension orders of respondent herein constitute the imposition purely of a penalty, since admittedly petitioner's qualifications are not at issue. Cf. Mansfield Journal Co. v. Federal Communications Commission, 86 U.S. App. D.C. 102, 180 F. 2d 28 (1950). This being so, the respondent is here attempting to use the remedial provisions of Section 609 as a means of depriving petitioner of his statutory right of trial by jury where punishment for a violation is the sole objective.

Section 903 (b) (1) of the Act provides, in pertinent part, as follows:

> "Any civil penalty imposed under this chapter may be collected by proceedings in personam against the person subject to the penalty . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be re-examined other than in accordance with the rules of the common law. . ." (Underscoring Supplied)

Thus, the statute clearly grants petitioner the right of trial by jury where a penalty imposition is sought. Had Congress not so provided in Section 903, then it seems clear that a serious question of constitutionality would be involved. See District of Columbia v. Colts, 59 App. D.C. 224, 38 F. 2d 535, aff'd 282 U.S. 63 (1930) in which Colts was held by this Court and the Supreme Court to be constitutionally entitled to a jury trial on a complaint for violation of the District of Columbia Traffic Act, which complaint contained language (operating a motor vehicle "recklessly. . . so as to endanger property and individuals") remarkably similar to the language of the complaint herein. (J. A. 3-4).

However, since Congress specifically provided for trial by jury in penalty cases in the present Act, the constitutional question need not be reached. In construing respondent's powers under Section 609 against the background of the statute as a whole, and in avoiding any question of unconstitutionality, it is clearly pertinent for the Court to bear in mind the Congressional grant of trial by jury in the penalty provisions of the statute. Thus viewed, Section 609 is clearly seen as a purely remedial statute granting powers in the public interest to inquire into fitness and qualifications. Respondent's use of it as a weapon of punishment by an administrative tribunal evades the Congressional grant of trial by jury in a penalty case. Section 903 (b) (1).

CONCLUSION

In view of the foregoing, this Court should set aside respondent's Supplemental Order of July 31, 1956 and the Order denying Petition for Reconsideration dated August 9, 1956, whereby respondent attempts to punish petitioner by suspending his airman certificate. An affirmance of the asserted power would be "not a construction of a statute, but, in effect, an enlargement of it" which "transcends the judicial function." Iselin v. United States, 270 U.S. 245, 250.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 13,553

SIDNEY W. WILSON,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR THE REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

JOINT APPENDIX

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In The
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

SIDNEY W. WILSON, Petitioner, v. CIVIL AERONAUTICS BOARD, Respondent.	No. 13,553

STIPULATION

Subject to approval by the Court, the parties hereby stipulate and agree as follows with respect to the issues, the matters to be contained in the joint appendix to briefs, and the dates for the filing of briefs and the joint appendix to briefs:

I

Issues

Petitioner, an airline pilot, seeks review (1) of a Board order (S-754) which imposed, as a deterrent sanction, a ten-day suspension of his pilot license for violations of the Civil Air Regulations, and (2) of a Board order (S-757) denying reconsideration of the suspension order. The single issue is stipulated to be:

Whether, in circumstances in which the Civil Aeronautics Board does not find the pilot to be unqualified to fly, the Board is empowered under Section 609 of the Civil Aeronautics Act to suspend his airman certificate as a deterrent sanction.

II

Content of Joint Appendix to Briefs and Use of Unprinted Portions of Transcript

It is stipulated that petitioner shall cause the following to be printed as the joint appendix to briefs:

1. This stipulation and the order of the Court approving the stipulation.

2. Complaint (pp. 3-4 of transcript).

3. Examiner's Initial Decision (pp. 389-399 of transcript).

4. C. A. B. Opinion and Order S-728 (pp. 450-461 of transcript).

5. C. A. B. Supplemental Opinion and Order S-754 (pp. 541-548 of transcript).

6. Petition for reconsideration (pp. 550-553 of transcript).

7. C. A. B. Order S-757 (pp. 557-558 of transcript).

The foregoing matters are believed to be adequate for full presentation of this case. It is stipulated and agreed, however, that either party on brief or argument, and the Court in reaching its decision, may refer to and rely upon any portion of the unprinted transcript of record to the same extent and effect as if such portion of the transcript had been printed, it being understood that the Court may order additional printing if it deems such printing to be necessary.

III

Time for Filing Briefs and Joint Appendix

The time for filing briefs and the joint appendix to briefs shall be as follows:

(1) Petitioner's principal brief, together with the joint appendix to briefs, will be filed on or before December 28, 1956.

(2) Respondent's brief will be filed on or before February 1, 1957.

(3) Any reply brief by petitioner will be filed within fifteen days after the filing of respondent's brief.

Lloyd Fletcher
Attorney for Petitioner

Franklin M. Stone
Attorney for Respondent

Before: Bastian, Circuit Judge, in Chambers.

ORDER

Upon consideration of the joint motion of petitioner and respondent to dispense with a prehearing conference in the above case and for approval of a stipulation as to the issues and to the manner of filing the briefs and joint appendix, it is

ORDERED that the prehearing conference now scheduled for November 15, 1956, be dispensed with, that the stipulation be approved and that the Clerk be, and he is hereby, directed to file said stipulation forthwith.

It is FURTHER ORDERED that the stipulation regarding the issues and manner of filing briefs and the joint appendix be printed in the joint appendix and unless modified by further order of this Court shall control further proceedings in this case.

Dated: November 14, 1956.

BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

Rec'd Dec. 31, 1954

FRED B. LEE
Administrator of Civil Aeronautics, Complainant,

v.

Docket No. SR 2188

Sidney W. Wilson, Respondent

COMPLAINT

Complainant brings this action under the provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 973; 49 U.S.C. 401 et seq.), and alleges

I

Respondent, during all times mentioned herein was the holder of Airman Certificate No. 26768 with an Airline Transport Pilot Rating.

II

On or about July 6, 1954, Respondent was pilot-in-command of a Douglas DC-6B aircraft, registration No. N8223H, operated in scheduled

air transportation as National Airlines Flight 611/6.

III

Respondent, while pilot-in-command of said Flight 611/6, on July 6, 1954, was cleared for and commenced an instrument approach to Runway 28 at Greater Pittsburgh Airport, Pittsburgh, Pennsylvania.

IV

Respondent, at the date and place previously alleged, and after he failed to land on Runway 28, did not execute the missed approach procedure specified in the standard instrument approach procedure for Runway 28, in that he did not climb to 2,500 feet on a course of 277 degrees and proceed to the Clinton Radio Beacon, thereby violating Sections 40.364 and 60.46 of the Civil Air Regulations.

V

At the date and place previously alleged, and after Flight 611 had failed to land on Runway 28, Respondent did not insure that a continuous radio watch on the appropriate radio frequency was maintained, in violation of Section 60.47 of the Civil Air Regulations,

VI

Respondent, in operating said aircraft as heretofore alleged, operated said aircraft in a careless and reckless manner so as to endanger the lives and property of others, thereby violating Section 60.12 of the Civil Air Regulations.

VII

Respondent, in operating said aircraft as heretofore alleged, failed to exercise the degree of care, caution and judgment required of him as the holder of an Airline Transport Pilot Rating.

WHEREFORE, Complainant requests that, in the public interest, the Airline Transport Pilot Rating of Respondent be suspended.

/s/ J. M. Dikeman
for Robert P. Boyle, General Counsel
Civil Aeronautics Administration

Dated this 31st Day of December, 1954

* * * * * *

[Rec'd Oct. 19, 1955, Civil Aeronautics Board]

389 INITIAL DECISION
(Hearing)

ISSUED: October 18, 1955

TO: Sidney W. Wilson, Respondent (Registered)
6095 S.W. 128th Street
Miami, Florida

Ralph L. Harkenrider, Attorney for Respondent
Air Line Pilots Association
55th Street and Cicero Avenue
Chicago 38, Illinois

Ned K. Zartman, Attorney
Civil Aeronautics Administration

Sydney J. Schneider, Attorney
Civil Aeronautics Administration

Robert P. Boyle, General Counsel for the
Administrator of Civil Aeronautics

This proceeding was brought under authority of Section 609 of the Civil Aeronautics Act of 1938, as amended. The Complainant filed a complaint with respect to the airline transport pilot rating held by Respondent charging him with violation of the provisions of Sections 40.364, 60.12, 60.46 and 60.47 of the Civil Air Regulations and requested Respondent's airline transport pilot rating be suspended.

The complaint was duly served on Respondent by registered mail. Respondent answered the complaint and requested an oral hearing.

Pursuant to Respondent's written request and after adequate notice served upon the parties, an oral hearing was held before the undersigned Hearing Examiner on March 17, 1955 in Pittsburgh, Pennsylvania. Mr. Ralph L. Harkenrider, Attorney, Legal Department, Air Line Pilots Association, Chicago, Illinois, appeared on behalf of Respondent. Mr. Sidney J. Schneider and Ned K. Zartman, General Counsel's Office, Civil Aeronautics Administration, Washington, D. C., appeared on behalf of Complainant.

390 The complaint charges Respondent, the holder of an airline transport pilot rating, on or about July 6, 1954 (Para. II) was pilot in command of a Douglas DC-6B aircraft, registration No. N8223H, operated in

scheduled air transportation as National Airlines' Flight 611/6; (Para. III) while pilot in command of said Flight 611/6 was cleared for and commenced an instrument approach to Runway 28 at Greater Pittsburgh Airport, Pittsburgh, Pennsylvania; (Para. IV) after Respondent failed to land on Runway 28, he did not execute the missed approach procedure specified in the standard instrument approach procedure for Runway 28, in that he did not climb to 2,500 feet on a course of 277 degrees and proceed to the Clinton Radio Beacon; (Para. V) after Respondent had failed to land on Runway 28, he did not insure that a continuous radio watch on the appropriate radio frequency was maintained; (Para. VI) operated the aircraft in a careless and reckless manner so as to endanger the lives and property of others; and (Para. VII) failed to exercise the degree of care, caution and judgment required of him as a holder of an airline transport pilot rating.

Respondent answering the complaint admits the allegations contained in Paragraphs I, II and III. As to the allegations contained in Paragraph IV, Respondent admits that on the date and at the place alleged he did not land on Runway 28 and he did not execute the missed approach procedure specified in the standard instrument approach for Runway 28, in that he did not climb to 2,500 feet on the course of 277 degrees and proceed to the Clinton radio beacon; but Respondent denies that his failure to execute the missed approach procedure specified could be construed to be or was thereby in violation of Sections 40.364 and 60.46 of the Civil Air Regulations. As to the allegations contained in Paragraph V, Respondent denies that on the date and place and after Flight 611/6 had failed, Respondent did not insure that a continuous regular watch on the appropriate radio frequency was maintained. Respondent denies the allegations contained in Paragraph VI that he operated the aircraft in a careless and reckless manner and denies the allegation contained in Paragraph VII that in operating Flight 611/6, he failed to exercise a degree of care and caution required of him as a holder of an airline transport rating.

The record consists of the oral testimony of Respondent, William R. Andrews, Walter A. Jensen, Cary Euwer, and the documentary exhibits offered by the parties. Respondent objected to the admission of Complainant's Exhibits 1, 2, 3, 4 and 5, in that they were not material and relevant to the issues. Respondent's objection has been considered. As Respondent is charged with failing to execute the missed approach procedure specified in the standard instrument approach procedure for Runway 28 at the Pittsburgh Airport, the Examiner is of the opinion that these exhibits are material and relevant to the allegations of Paragraph IV of the complaint and, therefore, Respondent's objections are denied and the exhibits admitted as evidence in the record.

The recorded conversations on July 6, 1954 between the pilot of Nationals' Flight 611/6 and other pilots of specified aircraft and the Civil Aeronautics Administration Traffic Controller in the Greater Pittsburgh Airport control tower between the hours of 0701E and 0806E on 118.7MC and 121.1MC were played on the recording machine at the hearing and heard by all parties present. The recorded conversations were later reduced to writing and submitted by agreement of counsel as part of the record in this proceeding.

391 Respondent was pilot in command of a Douglas DC-6B aircraft No. N8223H operated in scheduled air transportation as National Airlines' Flight 611/6. The flight was conducted under an interchange agreement between Capital Airlines and National Airlines. The flight originated at Miami, Florida, and stopped at several places including Washington, D. C., which was the terminal stop for National Airlines and the interchange point. The flight proceeded over the route of Capital Airlines from Washington, D. C. to Detroit, Michigan. The first scheduled stop was Pittsburgh, Pennsylvania, the site of the incident involved. The crew was composed of Respondent as pilot in command; First Officer E. C. Gould; and Flight Engineer George R. Bannister.

The missed approach procedure for Runway 28 at Greater Pittsburgh Airport is a part of the procedure authorized in Capital Airlines and National Airlines operation specifications. The missed approach

procedure required Respondent to climb to 2,500 feet or higher if directed by ATC on the west course of the ILS or a 277 degree course. The standard instrument approach procedure prescribed for Runway 28 in effect July 6, 1954 was promulgated as part of 609 of the Regulations of the Administrator and published in the Federal Register, February 4, 1954. Such publication, therefore, constituted constructive notice to all interested parties.

Respondent was proceeding from Washington, D. C. to Pittsburgh, Pennsylvania. In the vicinity of Mt. Pleasant, Pennsylvania, Respondent requested and obtained from Pittsburgh Air Traffic Control an instrument flight rule clearance. Respondent continued toward Pittsburgh and at 0701E, Pittsburgh Approach Control, transmitting on radio frequency 118.7MC, cleared Respondent over McKeesport, to the River radio beacon. Respondent was advised that his runway would be 28. Flight 611/6 acknowledged this radio message on the same frequency. At 0705E Respondent reported over McKeesport. The approach control at Pittsburgh informed Respondent that he had Flight 611/6 in radar contact and cleared Respondent for a straight-in approach to Pittsburgh Airport and again advised Respondent that the runway would be 28. At 0708E, Pittsburgh Approach Control still transmitting on 118.7MC after giving Flight 611/6 its position in relation to the River beacon and the localizer course instructed Respondent to change to 121.1MC and report when over River radio beacon inbound. At 0710E, Respondent reported passing the River radio beacon. This transmission was made on a radio frequency of 121.1MC to the local controller in the Pittsburgh tower. The local controller on the same frequency cleared Respondent to land on Runway 28. Respondent did not accomplish a landing on Runway 28 on this approach. Up to this point, the operation of the plane was routine. Respondent made a straight-in instrument approach to Runway 28 under an IFR clearance and because of the weather conditions prevailing at the time, an instrument letdown and instrument approach at the airport was necessary.

Respondent admits in his answer and in his oral testimony given at

the hearing that he did not execute the standard missed approach procedure. Respondent testified that after the missed approach to Runway 28, Flight 611/6 proceeded straight ahead for two minutes on a course approximately 277 degrees-282 degrees, climbing to about 2,500 feet, then made a turn of 50 degrees to the left and then made another turn to the right paralleling the localizer course to the Clinton marker. Respondent never reached the Clinton radio beacon but circled approximately a mile and a quarter southeast thereof. Respondent gave as his reason for failing to proceed to the Clinton marker in accordance with the prescribed standard missed approach procedure, the presence of an Aero Commander aircraft in the immediate vicinity of the marker.
392
Respondent contends that this fact is substantiated by the taped transcription of 118.7MC and that Mr. Andrews, the radarscope operator had no recollection of the Aero Commander being in the vicinity. Respondent through the cross-examination of Mr. Andrews and the direct theoretical testimony of Mr. Jensen, whom he called as an expert witness on radar, attempted to raise the implication that Mr. Andrews did not properly identify Flight 611/6 on the radarscope or that some interference might have been present which interfered with his observations on the morning of the incident. Respondent reported to Pittsburgh Approach Control on 118.7MC when he was over McKeesport. Mr. Andrews, the approach controller acknowledged and transmitted to Respondent on the same frequency stating that he had the flight in radar contact. The position of McKeesport was indicated on the radarscope. It was evident at 0705E that Mr. Andrews had properly identified Flight 611/6. Mr. Andrews continued to observe Flight 611/6 through the use of the radarscope as the flight made its approach to Runway 28. Mr. Andrews testified that Respondent after failing to land on Runway 28, proceeded straight ahead in a westerly direction across the field to the western boundary of the airport. At that point, Respondent started a turn to the left and continued turning until Respondent came out on an easterly heading. Respondent then proceeded southeast of the field and when Respondent was approximately at the approach end of Runway 32, Respondent made a right turn

and headed in the direction of Union radio beacon. Mr. Andrews illustrated the course of Flight 611/6 by a diagram drawn by him at the request of Respondent's attorney. Examination of the 118.7 recorded radio transmissions discloses that after Respondent missed his approach to Runway 28, Mr. Andrews inquired as to where Respondent was proceeding and Respondent replied that he was at Union radio beacon 2,500 feet in the clear and on top. It, therefore, appears that Flight 611/6 was then proceeding to Union radio beacon. Respondent did not mention in any radio transmission to the controller at that time that he was circling Clinton or anywhere in the vicinity of Clinton. Respondent on being questioned by the Examiner stated that at the time he missed his first approach to Runway 28, he had in his mind making the next approach to Runway 32.

With respect to the 45 to 60 degree turn to the left and then a turn to the right resulting in paralleling the localizer course of Clinton marker, Respondent testified that he passed straight over Runway 28 after passing the Parkway marker. Later he testified that he was slightly to the north of the course to Clinton and a left turn was made to get back on course. This should have required only a slight turn to the left in order to correct for proper course. The Parkway marker is about 7 3/4 miles from Clinton radio beacon and with Respondent climbing straight ahead at a normal climbing speed, he would have covered 5 miles putting him about 2 3/4 miles from Clinton at the time the left turn was made. Mr. Andrews, the radarscope controller, testified that Flight 611/6 after its first missed approach made a turn approximately 180 degrees and proceeded on an easterly heading southeast of the field. It seems very unlikely that a 45 degree to 60 degree turn as such testified to by Respondent was actually taken. If at the time the flight did make the left and right turn why was it necessary for Mr. Andrews to have aborted the approach of Capital 872 or to have informed Flight 611/6 that he did not know whether Respondent was coming back to land. With reference to the testimony of Respondent that a turn within a radius of 1 1/2 to 2 miles would have resulted in tight bank, the Examiner is of the opinion

that the aircraft would have turned well within the 1 1/2 to 2 miles as testified to by Mr. Andrews.

393 Respondent further testified that after climbing on top he saw the Aero Commander aircraft over the Clinton radio beacon and he started circling approximately 1 mile to 1 1/4 mile southeast of Clinton. The record shows that Respondent did not report this aircraft to Pittsburgh Approach Control and that he was not going to follow the missed approach procedure. Mr. Andrews, controller, testified that there was no aircraft in the vicinity of Clinton at the time and that he did not receive any transmission from Flight 611/6 referring to another aircraft. Neither the 118.7MC nor the 121.1MC recorded radio transcript show that Respondent reported after the first missed approach or any reply to such a report. When Mr. Andrews told Respondent he couldn't ascertain his intentions, Respondent in his response did not mention the Aero Commander but stated only that he had lost the field. The recorded radio transmission shows that Flight 611/6 missed its approach to Runway 28 at approximately 0713E. The Aero Commander first contacted Pittsburgh Approach Control on 118.7MC at 0714E. At that time, the Aero Commander gave no position report or any indication that it was circling over Clinton. It would appear that under normal circumstances had the Aero Commander been circling over an identifiable navigational facility, it would have reported to Air Traffic Control. It was not until 0718E, five minutes after the missed approach of Flight 611/6, that the Aero Commander reported as "just passed Clinton now." This was a full five minutes after Respondent missed his approach. Therefore, it can be inferred that the Aero Commander was five minutes away from Clinton when Respondent claims he saw the aircraft over Clinton. Respondent testified that he did not recall whether the Aero Commander was still over Clinton after the second missed approach. At 0727E after missing his second approach Respondent reported that he was proceeding to Clinton. Immediately thereafter Mr. Andrews cleared Respondent to leave Clinton on a heading of 180 degrees to Union and also informed him that his traffic was an Aero Commander holding 500 on top over Clinton. At

0729E, Respondent, after receiving the weather report, decided to hold for improvement in the weather. Mr. Andrews then cleared Respondent to return to Clinton to maintain 4,000 feet to hold west of Clinton. At 0730E Mr. Andrews again informed Respondent that the Aero Commander was holding over Clinton. The Aero Commander held over Clinton until 0739E when it then reported it was proceeding to Wheeling, West Virginia. Thus it appears that Mr. Andrews' recollection was accurate when he testified that there was no aircraft at the time Respondent missed his approach to Runway 28. It is obvious that Respondent's testimony must be based on the recollection of seeing an Aero Commander or hearing about an Aero Commander over Clinton after his second missed approach and not after the first missed approach.

Respondent attacks the credibility of Mr. Andrews' testimony on ground that Mr. Andrews' memory was poor on the day of the hearing; that he testified without notes after an elapsed period of eight months; that he did not see the aircraft physically which was represented on his radarscope as a dot approximately one-quarter of an inch in size; and, that Mr. Andrews did not explain such radar phenomena as sub-clutter, ground-clutter, precipitation interference, tangential courses and merger targets. Respondent contends that there was no one present to corroborate Mr. Andrews' observations on the radarscope. The record shows that Mr. Andrews was qualified in 1947 as one of the first radar controllers in the country. Since that time he has had extensive experience as a radar controller. Mr. Andrews testified that he was not a radar engineer but strictly a controller whose duty is to observe the radarscope. Respondent upon cross-examination of Mr. Andrews at-

394 tempted to cast doubt on Mr. Andrews' observations of the radarscope. Respondent also further attempted to discredit Mr. Andrews through the testimony of Mr. Jensen whom he called as an expert witness to explain the radar phenomena of sub-clutter, ground-clutter, precipitation interference, tangential courses and merger targets. Mr. Andrews did not attempt to describe these technical engineering terms and no attempt was made by Complainant to qualify Mr. Andrews as a radar

engineer. As a radar operator, Mr. Andrews testified that he recognized such factors as sub-clutter, and other interferences to be considered in controlling aircraft with the use of radar. Mr. Andrews in his testimony stated that none of these factors were present at the time of his observations of Flight 611/6 on July 4, 1954 and that there was no interference with his observations and control of aircraft under his jurisdiction at that time. Although there is always the possibility of interference or misleading indications on the radarscope, there is no testimony in the record to indicate that these factors existed at the time of the incident alleged in the complaint. There was no malfunction of the electronic equipment then being used and Respondent produced no evidence that any of the phenomena mentioned were actually present at the time of Mr. Andrews' observation. There was a man in the radar shack with Mr. Andrews working liason but he was not observing radar. The duties of this man were to obtain flight data and weather clearance from the Air Traffic Control Center. While there was no person to corroborate Mr. Andrews' testimony, sufficient corroboration can be found in the 118.7 MC and 121.1MC recorded radio transcriptions. The Examiner closely observed Mr. Andrews' personal demeanor and his manner of testifying and in the opinion of the Examiner, Mr. Andrews' testimony is credible and of substantial, reliable and probative value. There is no doubt in the Examiner's mind that Flight 611/6 followed the flight path actually observed by Mr. Andrews as controller on the radarscope.

With respect to the allegation that after Flight 611/6 had failed to land on Runway 28, Respondent did not insure that a continuous radio watch on the appropriate radio frequency was maintained, the written transcriptions of the tape recording reveals the radio communication between Pittsburgh Approach Control (118.7MC) and tower controller (121.1MC) and the Respondent. Flight 611/6 contacted Pittsburgh Approach Controller at 0701E and was cleared over McKeesport radio beacon and advised that approach for landing would be on Runway 28. At 0705E Respondent reported over McKeesport and at that time the Pittsburgh Approach Controller reported that he had the aircraft in

radar contact. At 0708E, Flight 611/6 was informed by Pittsburgh Approach Control that it was three miles east southeast of River beacon and approximately 1 3/4 miles south of the localizer course. The aircraft was requested to change to 121.1MC and this transmission was acknowledged by Respondent. On 121.1MC, Respondent reported at 0701E, that he was passing over the River beacon. At 0713E, the tower controller asked Respondent whether he had just passed over the airport and immediately thereafter he requested Respondent to change to approach control 118.1MC and Respondent acknowledged the transmission. During the next two minutes between 0713E and 0715E, four calls were made to Flight 611/6 on the 121.MC frequency. No response was received from Respondent. The 118.7 frequency transcript shows that at 0713E three calls were made by the approach control to Flight 611/6 and during the period 0714E to 0715E three additional transmissions were made on that frequency to Respondent's aircraft. Several calls were made simultaneously on both 118.7MC and 121.1 MC. At 0715E, Respondent called the Pittsburgh Approach Control. On the approach to Runway 28,

395 Respondent stated that he was on the tower frequency 121.1MC and had his radio tuned to that frequency during the approach and on the first pull-up after abandoning the approach. The Respondent was contacted by the tower controller on 121.1MC immediately after his approach was missed and was requested to change to 118.7MC and Respondent acknowledged that transmission and thereafter Respondent was called by approach control on 118.7MC. He claims that he did not hear the Approach Control transmission because he was being called on the wrong frequency. However, the record shows that Respondent was called three times on 121.1MC frequency and three times on 118.7MC and on two occasions calls were made simultaneously on both frequencies. Finally, Respondent replied on 118.7MC at 0715E. The record, therefore, shows it was two minutes from the time when Respondent acknowledged a request to change frequencies to the time when he finally replied (0713 1/4 to 0715 1/4). Respondent's contention that he was called on the wrong frequency and that he only failed to respond to the Approach Control

transmission for the scant period of 1 1/4 minutes, is not supported by the record, neither is Respondent's contention that he was too busy to reply supported by the record. In the cockpit with Respondent at the time was the first officer and flight engineer. The first officer was flying the aircraft. It appears that Respondent's job was to handle the radio communication. During the time when the Respondent's aircraft passed over the field, he acknowledged the tower control request to switch to 118.7MC frequency and during his first approach to Runway 28 he was in continuous radio contact with Pittsburgh Approach Control. Further, the recorded transcript of the radio communications during two other missed approaches shows he was in radio contact continuously. His radio was not malfunctioning.

Flight 611/6 was making a straight-in instrument approach to Runway 28 under an IFR clearance. Because of the weather conditions prevailing at the time, an instrument letdown and instrument approach at the airport were necessary.

The first issue for decision is whether Respondent was required to comply with the missed approach procedure specified in the standard instrument procedure for Runway 28 at the Greater Pittsburgh Airport as set forth in the operation specifications of National Airlines and Capital Airlines and prescribed by the Administrator; and whether Respondent's failure to execute the missed approach procedure was in violation of Section 40.364 and 60.46 of the Civil Air Regulations.

Section 40.364 of the Civil Air Regulations reads as follows:

> "When an instrument approach is necessary, the instrument approach procedures and the weather minimums authorized in the operation specifications shall be adhered to."

The missed approach procedure, which is a part of the standard instrument approach procedure authorized in Capital Airlines and National Airlines operation specifications, required Respondent to climb to 2,500 feet (or higher if directed by ATC) on the west coast course of the ILS or a 277 degree course to Clinton radio beacon after missing an approach on Runway 28 at the Greater Pittsburgh Airport. Section

60.46 of the Civil Air Regulations reads as follows:

396 "When instrument let-down to an airport is necessary, a standard instrument approach procedure prescribed for that airport by the Administrator shall be used, unless:

(a) A different instrument approach procedure specifically authorized by the Administrator is used, or

(b) A different instrument approach procedure is authorized by air traffic control for the particular approach, provided such authorization is issued in accordance with procedures approved by the Administrator.

NOTE: Standard instrument approach procedures prescribed by the Administrator are published in the CAA Flight Information Manual, for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington 25, D.C. Such procedures have been carefully investigated with respect to pattern and terrain clearance. Safety would not permit several aircraft to make simultaneous use of more than one instrument approach procedure unless such operations were controlled."

The missed approach procedures are part of the standard instrument approach procedures prescribed in Section 609.11 of the regulations of the Administrator. It appears from the language of the regulations that no exception is provided. However, Section 40.360 and 60.2 of the Civil Air Regulations permits a deviation from prescribed procedures in an emergency situation. Respondent admits that he did not proceed to the Clinton radio beacon after the missed approach to Runway 28 in accordance with the missed approach procedure for the reason that an Aero Commander aircraft was circling over Clinton. There is no evidence in the record that Respondent at any time declared an emergency

existed. Nor is there any evidence in the record to show that Respondent reported to Pittsburgh Approach Control or the tower controller that he was not proceeding to Clinton radio in accordance with prescribed procedure. Therefore, Respondent's only reason for not executing the missed approach procedure after the first missed approach to Runway 28 is the presence of an Aero Commander aircraft over Clinton radio beacon. Respondent is not supported by the record in this contention. The record clearly shows that the Aero Commander aircraft did not reach the Clinton radio beacon and did not report his position as being in the vicinity of the beacon until fully five minutes after Flight 611 missed its first approach to Runway 28. In the opinion of the Examiner, it is apparent that after Flight 611/6 missed its first approach, Respondent then made up his mind to make his second approach to Runway 32 and disregard the prescribed missed approach procedure for Runway 28. Respondent did not actually see the Aero Commander until his second approach to Runway 32. In the opinion of the Examiner, there is no evidence to support any justification for Respondent's failure to execute the missed approach procedure for Runway 28. The Examiner concludes from the evidence of record that Respondent should have followed the prescribed missed approach procedure completely and that Respondent's failure to climb to 2,500 feet on a course of 277 degrees and proceed to the Clinton radio beacon after failing to land on Runway 28 after his first approach was in violation of the provisions of Section 40.364 and 60.46 of the Civil Air Regulations as charged in Paragraph IV of the complaint.

397 The second issue for decision is whether Respondent, the pilot in command of Flight 611/6 after failing to land on Runway 28 did not insure that a continuous radio watch was maintained as provided by Section 60.47 of the Civil Air Regulations.

Section 60.47 of the Civil Air Regulations reads as follows:

> "Within control zones and control areas the pilot in command of the aircraft shall ensure that a continuous watch is maintained on the appropriate radio frequencies

and shall report by radio as soon as possible the time and altitude of passing each designated reporting point, or the reporting points specified by air traffic control, together with weather conditions which have not been forecast, and other information pertinent to the safety of flight.

NOTE: Designated reporting points are noted in publications of aids to air navigation. Control of air traffic is predicated on knowledge of the position of aircraft in flight. The reporting of unanticipated weather encountered en route such as icing or extreme turbulence may be of importance to the safety of other aircraft anticipating flight within the area."

There is no dispute that Flight 611/6 was operating in a control zone at the time of its approach to Runway 28. Part 60, Air Traffic Rules, is applicable to all civilian aircraft operating anywhere in the United States. Therefore, Respondent was required to insure that a continuous watch is maintained on the appropriate radio frequency. The purpose of the regulation is to control air traffic and in order to maintain control, the air traffic or tower controller must know the position of all aircraft in flight in their particular control area. This means, therefore, that the pilot in command of aircraft has the dual function of listening in on the appropriate radio frequency for reports and instructions and also transmit reports on the position of the aircraft, particularly while operating under IFR rules. The record shows that for a period of two minutes after Flight 611/6 missed its first approach on Runway 28, the flight was called several times simultaneously on frequencies 118.7MC and 121.1MC. There is no evidence of malfunctioning of the radio equipment or that Flight 611/6 was being called on the wrong frequency. The Examiner is of the opinion that the cockpit procedures after a missed approach are not so complicated that either the pilot in command or co-pilot with considerable hours of experience in DC-6 aircraft could have a justifiable excuse in failing to answer

calls transmitted simultaneously on two radio frequencies for a period of two minutes. The Examiner concludes that Respondent, therefore, violated the provisions of Section 60.47 of the Civil Air Regulations.

Respondent, the holder of an airline transport rating, while exercising the privileges of his rating as pilot in command of an aircraft engaged in passenger air transportation, should perform his duties with such care, caution and judgment to insure a standard of performance with the highest possible degree of safety. On the basis of the record in this proceeding, failure of Respondent to execute the missed approach procedure prescribed for Runway 28 of the Greater Pittsburgh Airport,
398 on July 6, 1954, is a careless operation of aircraft so as to endanger the life and property of others and thereby constitutes a violation of Section 60.12 of the Civil Air Regulations. Respondent by operating aircraft engaged in commercial passenger air transportation in a careless manner and his failure to insure that a continuous radio watch on the appropriate radio frequency was maintained after failing to land on Runway 28 demonstrates a lack of care, caution and judgment required of Respondent as the holder of an airline transport pilot rating.

For the reasons given herein, Respondent's motion to dismiss the complaint is denied.

The final question for determination is whether on the basis of the record in this proceeding the interest of the public requires a suspension of Respondent's airline transport rating. Respondent when cleared to land on Runway 28 after passing the River beacon was given the 0708 weather as ceiling estimated 300 visibility 3 miles. Respondent descended to 400 feet and could not see the runway. The 0715 weather report gives the ceiling as 400 feet visibility 4 miles. It is apparent that the actual ceiling was well below 300 feet. This probably was a major factor in influencing Respondent's decision at the time he pulled up and abandoned his approach for a landing on Runway 28 to make his next attempt for landing on Runway 32 with lower ceiling permitted for landing. After missing two approaches for landing on Runway 32, the aircraft being

piloted by first Officer Gould, Respondent took over on the third try and landed without incident.

The record shows that Respondent, age 37, married, has been flying since 1936 and at the end of February, 1955, had a total of 10,252 flying hours. Respondent has been flying for National Airlines a little over nine years. He was checked out in December 1946 as a Captain. Respondent has approximately 1600 hours in four-engine aircraft of the DC-6B and DC-7 type and 1,775 hours in DC-4 aircraft. His instrument time shows 1,040 hours at the end of February. He received his airline transport pilot rating in January or February, 1953. The complaint was filed December 31, 1954, approximately five and twenty-five days subsequent to the date of the violation alleged. Approximately fifteen months have now elapsed since the date of the violations and during this period of time, Respondent has flown many hours in command of DC-6 and DC-7 aircraft without incident occurring of the same nature of the violations charged in the complaint. As of this time, any suspension of Respondent's airline transport pilot rating for a period of fifteen to twenty days would in effect be a punishment and not of a remedial nature. For these reasons, the Examiner is of the opinion that no useful purpose would be served by imposing a suspension of Respondent's airline transport pilot rating and that the public interest at this time does not require any remedial action.

FINDINGS

The Examiner upon consideration of the whole record in this proceeding, makes the following findings:

1. That Respondent during all times mentioned herein was and now is the holder of Airman Certificate #26768 with airline transport pilot rating;

399 2. That Respondent on or about July 6, 1954, was pilot in command of a Douglas DC-6B aircraft, registration No. N8223H operated in scheduled air transportation as National Airlines Flight 611/6;

3. That Respondent while pilot in command of said Flight 611/6 on July 6, 1954 was cleared for and commenced an instrument approach to

Runway 28 at Greater Pittsburgh Airport, Pittsburgh, Pennsylvania;

4. That Respondent on the date and at the place previously alleged, and after he failed to land on Runway 28, did not execute the missed approach procedure specified in the standard instrument approach procedure for Runway 28 in that he did not climb to 2,500 feet on a course of 277 degrees and proceed to the Clinton radio beacon, thereby, violating the provisions of Section 40.34 and 60.46 of the Civil Air Regulations;

5. That on the date and at the place previously alleged and after Flight 611/6 had failed to land on Runway 28, Respondent did not insure that a continuous radio watch on the appropriate radio frequency was maintained in violation of Section 60.47 of the Civil Air Regulations;

6. That Respondent in operating said aircraft as heretofore alleged by not executing the missed approach procedure specified in the standard instrument approach procedure for Runway 28 and did not insure that a continuous radio watch on the appropriate radio frequency was maintained operated said aircraft in a careless manner so as to endanger the life and property of others, thereby violating Section 60.12 of the Civil Air Regulations;

7. That Respondent in operating said aircraft as heretofore alleged failed to exercise the degree of care, caution and judgment required of him as a holder of an airline transport pilot rating;

8. That at this time, the public interest does not require any remedial action against Respondent's airline transport pilot rating.

ORDER

IT IS ORDERED, That this proceeding be, and the same is, hereby terminated effective the 1st day of November, 1955.

APPEAL

Either party to this proceeding may appeal the Examiner's initial decision. Notice of appeal shall be filed by Appellant with the Civil Aeronautics Board, Safety Enforcement Proceedings Division, Docket Section, Washington 25, D. C., on or before the 27th day of October,

1955. Appellant shall, within 10 days thereafter, file a specification of errors and cause a copy to be served upon the other party. If no appeal to the Board from either party nor motion by the Board to review the initial decision is filed within the time allowed, this initial decision shall be come final (Sections 301.260e), 301.30 through 301.34 of the Rules of Practice in Air Safety Proceedings).

/s/ Joseph C. Caldwell, Jr.
Regional Hearing Examiner

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450 Decided: March 28, 1956

APPEARANCES:

Sydney J. Schneider and Ned K. Zartman for Complainant.

Ralph L. Harkenrider and F. Harold Bennett for Respondent.

OPINION

BY THE BOARD:

This proceeding involves a complaint filed December 31, 1954 by the Administrator of Civil Aeronautics which charges the respondent Sidney W. Wilson with certain violations of the Civil Air Regulations,[1/] and seeks suspension of his airline transport pilot rating. Respondent's answer denied the violations charge l.

After due notice a public hearing was held before Examiner Joseph C. Caldwell, Jr., who has issued his Initial Decision. In it he found that on July 6, 1954, respondent, while in command of a National Airlines' DC-6B in scheduled air transportation, after having been cleared for an instrument approach to runway 28 at the Greater Pittsburgh Airport, Pittsburgh, Pa. and making such approach without landing, (a) violated Sections 40.364 and 60.46 of the Civil Air Regulations [2/] by failing to

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1/ Sections 40.364, 60.46, 60.47, and 60.12; see notes 2, 3, and 4, infra.

2/ Section 40.364 and Section 60.46 of the Civil Air Regulations require in effect that, unless special authorization is received, an instrument approach shall be conducted in accordance with procedures approved by the Administrator. In the case of an air carrier, such procedures are normally set forth in the operations manual in compliance with the requirement of Section 40.51 et seq. of the Civil Air Regulations.

execute the prescribed missed approach procedure for that runway, (b)
451 violated Section 60.47 of such regulations [3] by failing to insure the maintenance of a continuous radio watch on the appropriate frequency, (c) violated Section 60.12 of said regulations [4] in that the aforesaid failures constituted operation of the aircraft in a careless manner endangering lives and property, and (d) failed to exercise the degree of care, caution, and judgment required of a holder of an airline transport pilot rating. The Examiner further found, however, that suspension of respondent's airline transport pilot rating, in view of respondent's good flying record before and since the violations here charged, would serve "no useful purpose" and that the "public interest at this time does not require any remedial action."

Both parties have appealed. The Administrator argues that the Examiner erred in failing to impose a suspension upon the respondent. Respondent assails the Examiner's determination that he committed the violations charged. Briefs have been filed by each party, and the case stands submitted for decision.

452 Upon consideration of the record, we agree in substance with the Examiner's findings of violations and also with his decision not to suspend, although we reach such result on a somewhat different basis, as hereinafter indicated. Our discussion will deal chiefly with the principal contentions of the parties in support of their respective appeals.

As previously indicated, the Administrator's charges were based upon alleged departures by respondent from established air traffic procedures after having failed to complete a landing on Runway 28 at the

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3/ Section 60.47 of the Civil Air Regulations requires in pertinent part that within control zones and control areas the pilot in command of an aircraft operated subject to instrument flight rules "shall ensure that a continuous watch is maintained on the appropriate radio frequencies and shall report . . . . other information pertinent to the safety of flight."

4/ Section 60.12 of the Civil Air Regulations prohibits operation of an aircraft "in a careless or reckless manner so as to endanger the life or property of others."

Pittsburgh Airport. The prescribed missed approach procedure for Runway 28 [5/] requires in essence that, if adequate visual reference to the ground for landing is not available after having descended to the minimum permissible altitude over the approach end of the runway, the aircraft be flown straight ahead, on a course almost due west, climbing to an altitude of 2,500 feet and proceeding to the Clinton radiobeacon, a distance of approximately 6 statute miles from the approach end of the runway. [6/] Based principally on the testimony of William R. Andrews as to his observations while on duty as Civil Aeronautics Administration radar traffic controller, the Examiner found that respondent's aircraft, after having executed an instrument approach to Runway 28 without landing, continued straight ahead only until over the far end of Runway 28 (approximately 1 1/2 miles or about 35 seconds flying time) and then made a left turn of about 180 degrees and flew east until southeast of the airport where a right turn was made.

453 Respondent admitted he did not proceed to Clinton, but asserted no turn was made until approximately two minutes after having passed over the approach end of the runway, by which time the aircraft had climbed clear of clouds. Thereupon, according to respondent, an Aero Commander aircraft was sighted about a mile away and respondent's aircraft, in order to avoid flying in close proximity to such other aircraft, made a left turn of roughly 50 degrees followed by a similar right turn.

Wilson's testimony, if accepted, may have exculpated him from the charge of having failed to follow the prescribed missed approach procedure. [7/] However, the Examiner discounted Wilson's testimony and

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5/ The standard instrument approach procedure prescribed for Runway 28 in effect on July 6, 1954 was promulgated as part of Part 609 of the Regulations of the Administrator.

6/ It is also to be noted that the Parkway marker beacon is 6 3/4 miles from Clinton, not 7 3/4 as indicated by Examiner.

7/ There would still remain the question of whether he should have sought permission from air traffic control for the deviation from prescribed procedures. The record clearly shows that he did not do so.

accepted the version of the incident testified to by the radar operator Andrews.

Respondent's principal attack on appeal is directed to the testimony of Andrews in an effort to show that the Examiner's findings are not supported by substantial, reliable and probative evidence. We have considered respondent's contentions on this score and have concluded that the Examiner's findings are properly supported. Several of these contentions, however, warrant comment.

Respondent argues that mathematical computation based on the testimony of Andrews, the radar controller, will effectively discredit Andrews' version of the plane's flight path. Respondent seems to interpret such testimony as describing a "U" turn with a diameter of a mile or less, and on that basis argues that such a turn at 180 or 190 miles per hour would have been so tight as to amount to a frightening "stunt" which would have necessarily resulted in passenger complaints. However, Andrews actually testified that the diameter of the arc of the turn was 1-1/2 to 2 miles and there is no doubt that such a turn would
454 not be so unusual as to be likely to evoke passenger complaints.

Respondent seeks to utilize the evidence in the transcript of the recorded radio messages as to the movements of the Aero Commander in a further effort to discredit the testimony of Andrews. Respondent first claims that Andrews stated that he did not see the Aero Commander on the radar screen at the time respondent allegedly sighted it over Clinton. Reasoning backwards from the undisputed 7:18 A.M. position report of that aircraft that it was then over Clinton, respondent correctly points out that at 7:15 A.M., the time it was allegedly sighted over Clinton, the Aero Commander could not have been more than three minutes flying time away from that point. Noting the considerable range of Andrews' radar, respondent concludes that the Aero Commander must have been visible on the radar scope. The short answer to this argument is that, while the Aero Commander probably was visible on the radar screen at 7:15 as respondent contends, a careful reading of Andrews' testimony

on this point shows that he did not testify to the contrary. 8/ Accordingly, this contention of respondent does not warrant reversing the Examiner's conclusion with respect to the relative weight of Andrews' and Wilson's testimony.

455 In this connection, two further matters bearing on the conflict of testimony merit comment. Thus, the Examiner in accepting the testimony of Andrews, commented specifically and in favorable terms upon Andrews' demeanor and manner of testifying. In reviewing the Examiner's findings, such conclusions must be accorded considerable weight. Moreover, there is additional circumstantial evidence to which the Examiner refers, which supports his conclusion to accept the testimony of Andrews over that of Wilson. Thus, for example, it seems reasonable that had respondent actually seen the Aero Commander at 7:15, as he says, that he would have reported its presence as another aircraft in a position he himself was supposed to occupy. The record is clear, however, that Wilson made no such report, even though communications with traffic control were resumed shortly after 7:15 and he remained in communication there for at least 45 minutes more. We must, therefore, reject

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8/ Andrews said, in essence, (a) that at 7:13 (not 7:15) he did not see an aircraft identified as the Aero Commander on his screen, and (b) that, although not certain, he believed there were no aircraft at all over Clinton at 7:13, but (c) that he did see a couple of blips at an unspecified location on his screen which were "probably over traffic", (i.e., passing aircraft which were not believed to contemplate an approach under Andrews' jurisdiction) which it "wasn't necessary for me to watch." Even if we were to conclude that Andrews' testimony is of little value as to the position of the Aero Commander prior to 7:18, Andrews' testimony as to the movement of Wilson's aircraft is not discredited since it, unlike the Aero Commander, had previously been identified on the radar scope and was then being controlled by Andrews. It is to be noted that if Andrews' version of respondent's flight path is accepted, it makes no difference whether the Aero Commander was over Clinton at 7:15 for respondent was not in a position to see it at that time, since Clinton was then about five miles away and almost directly to his rear. In this connection it is significant that the transcript of radio messages shows that between 7:15 1/4 and 7:15 1/2 respondent, asked whence he was then proceeding, replied to the Union radiobeacon, which lies southeast of the airport. This is generally consistent with the flight path version of Andrews rather than of respondent.

respondent's contention that the Initial Decision, which rests principally upon Andrews' testimony with respect to the missed approach, is unsupported by substantial, reliable, and probative evidence. 9/

In reaching this conclusion we have also considered respondent's contention that Andrews' entire testimony must be disregarded because of an oral "stipulation" between counsel for respondent and counsel for the Administrator made at the beginning of the hearing to the effect that the Administrator, in calling respondent as his own witness, would be bound by respondent's testimony. The subsequent history of the proceeding negates the effect which respondent now places upon this stipulation. Thus, after respondent had testified on direct examination as the Administrator's witness and had given his own version of the incident, the Administrator called as his second witness Andrews, whose testimony was in substance accepted by the Examiner as the basis of his findings of violations. Respondent offered no objection when Andrews was called, and, in addition, made no objection based upon the prior stipulation as to the effect of respondent's testimony at any point during the course of Andrews' testimony. Moreover, at the conclusion of Andrews' direct testimony no motion was made to strike such testimony, but instead respondent proceeded to cross-examine Andrews on his version of the incident. The Administrator offered no further witnesses, and respondent moved, unsuccessfully, to dismiss the complaint "for lack of substantial, probative, or reasonable evidence of any violation as alleged therein", without further specification of the ground for the motion. Respondent then testified on his own behalf, and additional witnesses were presented by respondent in an effort to support his testimony and impeach that of Andrews. At the conclusion of the hearing, respondent again moved for dismissal of the complaint for lack of evidentiary support without reference to the stipulation. Respondent's

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9/ It is also to be noted that, as indicated by the radio transcript, Andrews' action in aborting the approach of a Capital aircraft is consistent with his present testimony with respect to Wilson's flight path, and inconsistent with Wilson's version.

first attempt to construe the stipulation as precluding the Administrator from presenting evidence contrary to that of respondent was in his brief to the Examiner. In such brief respondent also declared for the first time that, if the stipulation had not been made, respondent had available and would have used his immunity as provided for in Section 1004 (i) of the Act.

457 Under all the circumstances just outlined, we are satisfied that Andrews' testimony was properly before the Examiner for consideration in arriving at his decision and is properly before the Board at this time. Whatever may have been the initial intention of the parties as to the stipulation, it is clear from the subsequent course of the hearing that the stipulation was in practical effect rescinded by the action of all the parties, or in any event the benefits thereof were waived. Moreover, there is nothing in the transcript to substantiate that respondent had any intention to claim the privilege against self-incrimination to invoke any immunity that might flow from Section 1004(i) of the Act.

The Administrator contends the Examiner erred in failing to order suspension of respondent's airline transport pilot rating, and that a 30 day suspension should be imposed. In support of this contention, the Administrator refers to the Examiner's statement that a suspension in this case would be a punishment and not of a remedial nature, and correctly points out that this statement does not fully answer the question whether suspension should be ordered. As is clear from the Brubaker case, 10/ the Board's statutory power to impose suspension "if the interest of the public so requires" 11/ includes the power to impose a punitive or disciplinary suspension for violations charged and found in cases where the public interest requires such action to prevent or deter further violations by the offending pilot or other pilots, even though the record contains no allegation or finding that the pilot is or may be unqualified. It is not clear from the Initial Decision whether the Examiner

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10/ Lee v. Brubaker and Olsen, Order No. S-631 adopted August 2, 1954.

11/ Section 609 of the Act.

squarely considered, as he should have, the question whether a punitive
458 or deterrent suspension - the only type sought herein is required by the public interest.

Turning to this question and taking into consideration all pertinent circumstances properly before us, we conclude that the detailed unfavorable findings concerning respondent's conduct hereinabove set forth should prove an adequate deterrent to a repetition of such conduct, and that the Administrator has not made a sufficient showing that the public interest requires the additional sanction of suspension of respondent's airline transport pilot rating.

The issue whether suspension should be ordered where a violation has been found is a material one upon which, under Rule 23(b), the burden of proof rests with the Administrator. In considering whether the Administrator has sustained that burden, we must weigh respondent's past record as a pilot, the nature of his offense and the situation in which it occurred, and the Board's practices in past cases of a similar nature, with a view to determining whether or not a disciplinary suspension is needed.

As the Examiner noted, respondent who is 37 years of age and married, has been flying since 1936 and had accumulated a total of over 10,000 hours flying time in early 1955. He has been flying for National Airlines for over nine years, with many hours in DC-4, DC-6B, and DC-7 aircraft and substantial instrument time, and he has continued to fly for National during a period of fifteen months from the time of the violations to the issuance of the Initial Decision herein. Thus respondent appears to have a long, clear flying record, continuing for twenty years throughout his adult life, a fact which tends to minimize the likelihood that additional disciplinary measures are needed to deter him from similar acts in the future.

The nature of respondent's violations, which have previously been described in detail, require little further elaboration. Suffice it that while respondent's violations were clearly more than technical and involved regulations which are highly important to air safety, his conduct

under the circumstances [12] did not involve any special or aggravating element of flagrancy or recklessness sufficient to dictate suspension regardless of the other factors discussed herein. Moreover, our decision not to impose a punitive suspension on respondent is not inconsistent with past practice. [13]

The Administrator contends that suspension is required in the public interest in order to prevent other airline pilots from losing respect for regulations and thus to deter them from engaging in conduct similar to respondent's. To demonstrate the existence of a danger of such disrespect for regulations among airline pilots, if respondent is not suspended herein, the Administrator quotes in his appeal brief what appears on its face to be a notice or bulletin to members of an airline pilots' union local commenting on a Board decision in a safety case in a manner which might well be regarded as supporting the Administrator's contention. However, as respondent has pointed out, this material is not in the record, and respondent has not had a fair opportunity to rebut it. Therefore, the Board may not properly consider it to respondent's prejudice in reaching its decision. Accordingly, the record does not contain any evidence as to the need for a period of suspension as a punitive or deterrent sanction.

460 It should not be overlooked that our decision herein, though it does not involve suspension, is not without disciplinary effect. Respondent is a professional pilot by occupation and, therefore, the issuance after

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12/ The Examiner noted, with specific reference to the question of suspension, that respondent had been given inaccurate current airport weather, in that he was told the ceiling was 700 feet (stated as 300 feet by typographical error in the Initial Decision) and thereupon descended to 400 feet when in fact the ceiling was well below 300 feet. Immediately thereafter operations were transferred to runway 32, which has lower minimums. Respondent's missed approach flight path did not involve an actual collision hazard. While these circumstances in no way justify respondent's violations, they help explain the context in which they occurred.

13/ See, for example, Horne v Simmons, Order No. S-538 of January 21, 1953.

full hearing and appeal proceedings of the detailed findings hereinabove set forth confirming the Examiner's conclusion that respondent violated important Civil Air Regulations without justification while flying in scheduled air transportation, will of itself be likely to exert a continuing influence on respondent's future activities in aviation. In the event respondent should ever again be found to have violated Civil Air Regulations, issuance of the present decision will constitute "previous disciplinary action for violation of air safety standards" within the meaning of Rule 26(b), which would be considered against respondent in the fixing of a sanction in any such case.

We have considered the remaining contentions of the parties in support of their appeals and find they should not alter the decision set forth herein.

An appropriate order will be entered.

Rizley, Chairman, Adams, Vice Chairman, Gurney and Denny, Members of the Board, concurred in the above opinion.

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ORDER

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That the appeals filed herein by the complainant and by the respondent be and they hereby are denied;

2. That the above-entitled proceeding be and it hereby is terminated.

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

Secretary

(SEAL)

* * * * * *

541 SUPPLEMENTAL OPINION AND ORDER ON RECONSIDERATION

On March 28, 1956, we issued a decision denying the cross-appeals of the Complainant, the Administrator of Civil Aeronautics, and the Respondent, Sidney W. Wilson, and affirming the Initial Decision. We sustained the Examiner's conclusion that Respondent, while in command of a National Airlines DC-6B had failed to follow prescribed missed approach procedures at the Greater Pittsburgh Airport and had failed to keep the required radio watch, thereby violating various provisions of the Civil Air Regulations. We also agreed with the Examiner that no suspension should be imposed.

Both the Complainant and Respondent have filed petitions seeking reconsideration and modification of our decision. We have heard oral argument on the Complainant's petition and received additional briefs in support of, and in opposition to Respondent's petition. 1/ The case now stands submitted for decision on the petitions for reconsideration.

In reaching our original decision in this proceeding, we found that Respondent, after having aborted a landing on runway 28 of the Greater

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1/ On April 6, 1956, the Complainant filed a petition for reconsideration and modification of our decision, insofar as it failed to impose a period of suspension on Respondent. The Administrator, asserting the importance of the matter to his over-all air safety responsibilities, asked for an opportunity to present oral argument in support of his petition, which request was granted on May 4, 1956. Thereafter, on May 11, 1956, after the normal time for seeking reconsideration had run, the Respondent sought leave to file a petition for reconsideration and modification of our decision insofar as it found that Respondent had violated the Civil Air Regulations. Respondent asked for oral argument on his petition. We granted Respondent leave to file the petition, but not his request for oral argument on the issues raised by his petition. However, we granted Respondent the right to file an additional brief in support of his petition, which he did. And the Administrator filed a brief in opposition thereto.

Pittsburgh Airport, failed to follow the prescribed missed approach procedure which required a climb straight ahead to a holding position at the Clinton radio marker. Instead, Respondent made about a 180° turn (with the diameter of the arc of turn being about 1-1/2 to 2 miles) to the left, flying until southeast of the airport where a right turn was made. During this time, the traffic controller attempted to make radio contact with Respondent without success for a two minute period, and to avoid the possibility of a collision, the traffic controller diverted a Capital Airlines aircraft which had been cleared to land after Respondent.

Our findings, as above outlined, were based primarily upon the testimony of the radar operator at the Greater Pittsburgh Airport upon whose demeanor and manner of testifying the Examiner had commented in favorable terms. We specifically rejected Respondent's attempted explanation for his admitted failure to follow prescribed procedures, namely that he had adopted a course different than the established missed approach procedure in order to avoid another aircraft in the Clinton vicinity.

Respondent's position in support of his petition for reconsideration involves largely a reassertion of his earlier contentions which we discussed, and rejected in our decision, and which warrant no further consideration. Respondent concedes that his testimony and that of the radar operator are in "irreconcilable conflict". And we do not find persuasive Respondent's arguments for rejecting the latter's testimony. 2/ As the

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543 2/ Respondent asks the Board to consider as additional evidence bearing on the radar operator's credibility, a letter dated July 10, 1954, addressed to National Airlines by Lowell S. Harding, a CAA Safety Agent, with respect to Respondent's actions which are the gravamen of this case. Respondent alleges that this letter quotes from the report made by the radar operator to his superiors, the alleged quotation being a statement that Respondent was repeatedly told to proceed to the Clinton radio beacon after the missed approach, whereas the record shows that no such radio call was made. Respondent suggests that the report shows such a carelessness with the truth as to indicate unreliability in the radar operator's testimony. Complainant, however, correctly contends that the letter submitted is not part of the record herein and may not be received in evidence without further hearing,

(continued on next page)

Administrator points out, there is an obvious difference in motivation between the radar operator and Respondent to which we cannot be oblivious. The Examiner, who heard both witnesses and had the opportunity to observe their demeanor and manner of testimony, accepted the radar operator's and necessarily rejected that of Respondent. Moreover, there is strong circumstantial evidence in the record supporting the radar operator's version of the incident as opposed to Respondent's. Thus, however plausible Respondent's story may be, we find it to be without substantial record support. 3/

One further matter on the question of violation warrants additional comment. Respondent argues, inter alia, that analysis of the transcription of the radio contacts between Respondent and the radar operator shows that Respondent kept a proper radio watch; that at most he failed to answer two radio calls in two minutes, which was due in
544 part to attention to necessary cockpit procedures and is "ordinary procedure". However, the Administrator properly points out that, under the circumstances involved, a radio silence of two minutes is certainly not ordinary procedure. A pilot who, in these circumstances, deviates from prescribed traffic procedures is obliged to advise the appropriate traffic controller of his action without delay. Any failure in this regard

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(footnote two continued): which Respondent has not sought. Furthermore, it would be unreasonable, without proof thereof, to attribute to the radar operator the contents of a letter written by another person. It should also be noted that counsel for Respondent, though specifically asked therefor, has failed to explain why the request for consideration of additional evidence was not timely filed within the requirements of Rule 301.34 of the Board's Rules of Practice in Safety Proceedings.

3/ In addition to the circumstantial evidence referred to in our earlier opinion as supporting Complainant's case, it is pertinent to refer to the transcription of the first radio conversation between Respondent and the radar operator after the missed approach. The transcription shows that when Respondent, on being called on his failure to proceed to Clinton, made no mention of the presence of an Aero Commander, which he now alleges was the reason for his failure to comply with the prescribed missed approach procedure, but merely said: "I lost the field there old buddy."

can lead to a serious safety hazard or the inconveniencing of other traffic as it did in the instant situation. 4/ It is therefore clear that the charge of failure to keep the required radio watch is supported by the record.

Based upon the foregoing considerations, and all the facts of record we find that Respondent's petition for reconsideration and modification of our decision should be denied.

We turn now to the Administrator's request for reconsideration of our decision not to suspend Respondent's airline transport pilot rating. In deciding not to suspend Respondent's airman certificate, we relied upon (a) the fact that Respondent had a clear flying record which minimizes "the likelihood that additional disciplinary measures are needed to deter him from similar acts in the future", (b) the absence of "any special or aggravatory element of flagrancy or recklessness", and (c) the conclusion that the mere finding of violations is, in effect, a type
545 of sanction.

The Administrator has vigorously contested our conclusion, arguing, inter alia, that the Board's statutory responsibility to assure the attainment of the highest degree of safety in air transportation is not discharged merely by the adoption of regulations; that "it is the added duty of the Board to support its regulations by the imposition of adequate sanctions for violations of them"; that a decision not to suspend is tantamount to issuing a "free pass" to the majority of airline pilots for "their

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4/ The record supports the conclusion that at least three calls and perhaps five were made to Respondent after missing his approach, rather than just two. The question as to whether it was three or five depends upon an interpretation of the time sequence. The particular recorded radio contacts involved are marked in 1 minute intervals; the transcription shows 3 contacts between 0713 and 0714. Respondent was advised to tune to the particular frequency on which the calls were made on 0713-1/4. The question then is how many of the calls were made after 0713-1/4. If all were so made, as is possible, then 5 calls were made to Respondent; if only one, then three were made. Only on the unreasonable assumption that all 3 calls were made prior to 0713-1/4 could it be concluded that only 2 calls were made to Respondent.

first detected violation" of Civil Air Regulations; that other pilots are not so treated by the Board; that there is no evidence to support the Board's conclusion that a finding of violation after he ing will of itself constitute a type of sanction; that the Board did not consider whether its action would have a deterrent effect on other pilots, which Complainant alleges it would not; and that consequently the Board's decision, "if left undisturbed will seriously jeopardize the Administrator's ability to discharge his statutory functions, particularly in the control of air traffic."

Respondent relies upon the factors stated in the Board's opinion as justifying the result reached. Respondent claims that the "most unkind thing you can do to a pilot is criticize his flying ability" and that a Board decision that he violated the Civil Air Regulations is "the most severe penalty that may be imposed on him".

In granting the Administrator's request for oral argument on the sanction issue, we gave recognition to the importance of the issues raised by the Administrator's petition. Upon reconsideration, we find that we are persuaded by the Administrator's view of the importance of imposing a suspension as a deterrent sanction in connection with our joint responsibility for attaining the highest degree of safety in air transportation.

546 We wish to make it clear that we do not endorse any general policy which would automatically eliminate any suspension of an airline transport pilot for his first detected violation of the Civil Air Regulations. So far as we are aware, the Board has never in the past announced an enforcement policy which would have this result, and to do so, would, we believe, be inconsistent with our responsibilities under the Act. The public interest in maintaining an effective enforcement program is manifest; if our air safety regulations are not observed, they make little contribution to the high degree of air safety in air transportation which we are charged with attaining.

On the other hand, we are mindful of our responsibility as a quasi-judicial body to weigh the individual's case and to temper the dictates of a broad enforcement policy with the maximum consideration for the rights of the respondent In any given case, we must, among

other matters, weigh the nature of the violations, the individual's past flying record and his attitude, including his conduct at the hearing, in determining the sanction, if any, to be imposed.

Upon reconsideration of our decision in this case, we find that these principles properly applied require a different result than we previously reached. Respondent, although having a good past flying record, committed a material violation of air traffic rules which are highly important to air safety. It is especially necessary under the current congested traffic conditions to adhere to prescribed air traffic rules and to maintain a proper radio watch. We agree with the Administrator that the detenrent aspect of a suspension in the case of failure to meet these requirements, is a factor to be weighed by the Board. In addition, it is significant that Respondent's explanation of his conduct
547 was properly rejected by the Examiner in favor of the conflicting testimony of the Administrator's witness. 5/ Weighing these factors, we have come to the conclusion that the interest of the public requires suspension of Respondent's airline transport pilot rating for a ten day period.

ACCORDINGLY, IT IS ORDERED, That Respondent's airline transport pilot rating be, and it hereby is suspended effective August 10, 1956, through August 19, 1956.

Durfee, Chairman, Gurney, Denny and Minetti, Members of the Board, concurred in the above opinion and order. Adams, Vice Chairman, filed the attached concurrence and dissent.

/s/ M. C. Mulligan
Secretary

(SEAL)

5/ It is to be noted that the Examiner commented favorably upon the demeanor and manner of testifying of this witness, without mentioning Respondent's demeanor, but rejecting his testimony.

548 ADAMS, VICE CHAIRMAN, CONCURRING AND DISSENTING:

I see no reason for changing in any respect the previous decision rendered March 28, 1956, and I therefore dissent from the action of the majority suspending the respondent's airline transport rating.

/s/ Joseph P. Adams

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[Rec'd Aug. 7, 1956, C.A.B.]

PETITION FOR RECONSIDERATION OF SUPPLEMENTAL OPINION AND ORDER AND FOR A STAY OF EXECUTION.

Respondent, Sidney W. Wilson, by and through his attorneys, F. Harold Bennett and Lloyd Fletcher, respectfully represents to the Civil Aeronautics Board as follows:

1. On March 28, 1956 this Board issued its decision denying the cross appeals of the parties hereto and affirming the Initial Decision of Examiner Joseph C. Caldwell, Jr., wherein the respondent was found to have violated various provisions of the Civil Air Regulations on or about July 6, 1954, while pilot in command of a National Airlines DC-6B. Said decision did not impose a suspension of respondent's airline transport pilot certificate.

2. Thereafter the parties filed their petitions seeking a reconsideration of said decision of March 28, 1956. After receiving briefs and oral arguments by the parties, this Board, on July 31, 1956, entered its "Supplemental Opinion and Order on Reconsideration" wherein the Board (Vice-Chairman Adams concurring and dissenting) reaffirmed its earlier decision that respondent had violated certain of the Civil Air Regulations but reversed that portion of its earlier decision which imposed no suspension of respondent's air line transport pilot certificate. In its said "Supplemental Opinion and Order on Reconsideration" the Board ordered that respondent's air line transport pilot rating be suspended effective August 10, 1956, through August 19, 1956. Vice

Chairman Adams dissented from the action of the majority so suspending
551 respondent's certificate.

3. Pursuant to Procedural Regulations, Part 301, Section 301.34, entitled "Rules of Practice in Air Safety Proceedings", respondent requests reconsideration by this Board of its said supplemental opinion and order and a stay of the effectiveness of said order until the Board has acted upon this petition and thereafter until the issues involved herein are finally determined by the appropriate appellate court.

4. Respondent respectfully submits that the Board has erred in its said supplemental opinion and order dated July 31, 1956, in entering a suspension of respondent's air line transport pilot rating as a punitive or deterrent sanction only. The Board's power to suspend an airman certificate is contained in Section 609 of the Civil Aeronautics Act of 1938, as amended, which reads in pertinent part as follows:

> "The Board may .... re-examine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or suspend in whole or in part, any ... airman certificate ... if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate ....."

Under said provision providing for the suspension powers of this Board, Congress has not granted to the Board any power to suspend an airman certificate as a punishment to the holder thereof. The section is designed specifically to enable the Board, as a remedial matter, to "re-inspect" aircraft and other components and "reexamine" the competency of airmen and thereafter, where the public interest so requires, to amend, suspend and revoke certificates. No power is granted under said section to punish an airman, the penalty provisions of said Civil Aeronautics Act of 1938, being contained in Section 901, providing for certain civil penalties for violation of the Act, and Section 902, providing for criminal

penalties for willful violations of said Act.

552 5. Respondent requests the Board to stay the effectiveness of its order dated July 31, 1956, suspending respondent's air line transport pilot rating August 10, 1956 through August 19, 1956, until this Board has acted upon this petition and thereafter until the issues involved herein can be finally determined by the appropriate appellate court. As reasons for this request, respondent asserts that, absent the requested stay and in the event he should ultimately prevail either in this Board or the courts, the damage suffered by him from a suspension of his certificate would be irremedial. Since the suspension order by the Board on July 31, 1956, is admittedly a punitive and deterrent sanction, it is submitted that no interest of the public is involved and, accordingly, the requested stay is just and equitable.

WHEREFORE, the premises considered, respondent respectfully prays as follows:

(a) That this Board reconsider its Supplemental Opinion and Order dated July 31, 1956, and reinstate its original decision of March 28, 1956, so as to remove the suspension of respondent's air line transport pilot rating.

(b) That this Board forthwith stay the effectiveness of its Supplemental Order dated July 31, 1956, until the Board has finally acted upon this petition and thereafter until final determination of the issues involved by the United States Court of Appeals for the District of Columbia Circuit.

(c) That in all events this Board stay the effectiveness of its Supplemental Order dated July 31, 1956, until final determination of the issues involved herein by the United States Court of Appeals for the District of Columbia Circuit.

553 Respectfully submitted,

/s/ F. Harold Bennett
55th Street and Cicero Avenue
Chicago, Illinois.

/s/ Lloyd Fletcher
1366 National Press Building
Washington, D.C.
Attorneys for Respondent

(Certificate of Service)

557 ORDER DENYING PETITION FOR RECONSIDERATION

On August 7, 1956, Respondent filed a petition seeking, inter alia, reconsideration of our Supplemental Opinion and Order in the above-entitled proceeding, Order No. S-754, dated July 31, 1956, insofar as such order suspended Respondent's airline transport pilot certificate for a 10-day period effective August 10, 1956. On August 8, 1956, the Complainant filed an answer opposing the relief requested.

Respondent's request for reconsideration is based upon the assertion, unsupported with citations of authority or substantial legal argument, that the Board's power under Section 609 of the Act does not encompass the imposition of a "punitive" suspension. Respondent argues that under the Civil Aeronautics Act of 1938, the Board's only power "to punish airmen" is contained in Section 901, providing for civil penalties for violation of the Act. We find Respondent's request for reconsideration without merit. Apart from any procedural considerations which may warrant denial of the petition, [1] it is patent that Respondent's contention as to the limitations of our power under Section 609 flies in the face of a consistent and unquestioned administrative practice over a period of more than fifteen years. [2] Accordingly, we shall deny the petition

558 for reconsideration.

Respondent also seeks a stay of the effectiveness of our order pending judicial review. In view of the fact that our order, unless stayed, would become effective and fully executed prior to the time permitted under our statute for filing a petition for review, it is necessary for the order to be stayed to preserve Respondent's right to appeal. It is

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1/ Thus, the Administrator properly points to the fact that this question could have been, but was not raised by Respondent at earlier stages of the proceeding. We agree that this eleventh hour raising of this question is hardly an exercise of due diligence.

2/ E.g., Landstrom, Airman Certificate 5 C.A.B. 65 (1941); Klotz, Airman Certificate, 13 C.A.B. 14 (1943); Smith, Airman Certificate, 13 C.A.B. 117 (1947); Davidson, Airman Certificate, 13 C.A.B. 171 (1949); Delphis Ben Johnson, Airman Certificate, 13 C.A.B. 564 (1953). Also compare Lee vs. Olson and Brubaker, Order No. S-631, dated August 2, 1954.

suggested by the Complainant that we deny the relief requested, since Respondent may obtain a stay from the Court of Appeals. However, in the present circumstances, we believe that we should not force the Respondent to seek judicial relief where it is patent that such relief would be forthcoming in order to preserve the Court's jurisdiction. We shall, therefore, stay the effectiveness of our order for 60 days from its date of issuance, and thereafter until final determination of the issues by the United States Court of Appeals for the District of Columbia Circuit, provided that within 20 days of the order, Respondent shall advise us in writing of his intention to seek such review.

THEREFORE, IT IS ORDERED:

1. That, except to the extent hereinafter granted, Respondent's petition for reconsideration and other relief be, and it hereby is denied;

2. That the effectiveness of Order No. S-754, dated July 31, 1956, be and it hereby is stayed for a period of 60 days after the date of issuance of said order, and that if a petition for review of said order is filed with the Circuit Court of Appeals for the District of Columbia Circuit within such time, said order shall be further stayed until final disposition of such petition by the Court; Provided, however, That this stay shall, without further order of the Board, terminate and the suspension heretofore ordered shall become effective on September 1, 1956, and continue through September 10, 1956, unless on or before 5:00 P.M. on August 29, 1956, Respondent shall have advised the Board and the Complainant in writing of his intention to file with the Court within the time allowed therefor a petition for review of the Board's order; and Provided, further, That should Respondent's airline transport pilot rating for a ten day period shall become effective 10 days after the issuance of the Court's judgment disposing of Respondent's petition for review.

By the Civil Aeronautics Board:

/s/ M.C. Mulligan

M.C. Mulligan
Secretary

(SEAL)

Vice Chairman Adams Concurring:

While I believe that the Board has the power under section 609 to suspend the respondent's certificate, I reiterate my previous position that it should not have used this power in the particular circumstances of this case.

JOSEPH P. ADAMS

FILED
SEP 6 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 434

SIDNEY W. WILSON, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

SIDNEY W. WILSON, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Sidney W. Wilson, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit decided in the above case on May 9, 1957 by which that Court affirmed orders entered by respondent suspending petitioner's airline transport pilot certificate.

OPINIONS BELOW

The Initial Decision of the Civil Aeronautics Board Hearing Examiner was issued October 18, 1955 It is not officially reported but appears in the Joint Appendix below as certified to this Court (J.A. 5-22). The

original Opinion and Order of the respondent, Civil Aeronautics Board, was issued March 28, 1956. It also is not reported officially but appears in said Joint Appendix below (J.A. 22-31). On reconsideration the Board issued its Supplemental Opinion and Order on July 31, 1956 which appears in the Joint Appendix aforesaid (J.A. 32-38). The Opinion of the Court of Appeals (U.S. App. D.C. , 244 F. 2d 773) is printed in the Appendix hereto. (pp. 1a to 3a)

JURISDICTION

The judgment of the Court of Appeals was entered May 9, 1957 and is included in the record as transmitted to this Court. The basis of jurisdiction in that court was Section 1006 of the Civil Aeronautics Act of 1938, 49 U.S.C. 646. This petition for a writ of certiorari is filed within the time prescribed in 28 U.S.C. Sec. 2101(c), as further extended to September 7, 1957 by Order of this Court dated July 26, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and 49 U.S.C. Sec. 646(f).

QUESTIONS PRESENTED

In a proceeding under Section 609 of the Civil Aeronautics Act of 1938, as amended, (49 U.S.C. Sec. 559, 52 Stat. 1011) the Civil Aeronautics Board issued, on reconsideration, an order suspending petitioner's airline transport pilot certificate for a period of ten days. There was no finding, nor was it contended, that petitioner was in any way unqualified to hold such certificate, the ten-day suspension having been ordered as a deterrent sanction against petitioner for violation of the Civil Air Regulations. The Court of Appeals affirmed the Board's Order.

The questions presented, therefore, are (1) whether under Section 609 of the Civil Aeronautics Act of 1938, Congress intended to empower the Board to suspend the airman certificate of a qualified pilot purely as a deterrent sanction for penal purposes, and (2) whether a long standing practice and custom of the Board is sufficient to justify the exercise of such penalty power under Section 609 of the Act.

STATUTES AND REGULATIONS

The pertinent provisions of the Civil Aeronautics Act of 1938 are Sections 609, 901 and 903, together with Civil Air Regulations Secs. 21.16, 21.41, 21.42, 21.24(d) and 40.301-302, all of which are set out in the Appendix hereto, pp. 3a to 7a, so far as material here.

STATEMENT OF THE CASE

Petitioner, Sidney W. Wilson, is an airline transport pilot employed by National Airlines, Inc. (J.A. 22). On December 31, 1954, the Administrator of Civil Aeronautics, asserting his authority under Section 609 of the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401 et seq.) filed a Complaint (J.A. 3-4) with the Civil Aeronautics Board alleging that petitioner, on July 6, 1954, while pilot-in-command of National Airlines Flight 611, a DC-6B aircraft, engaged in air commerce between Miami, Florida and Pittsburgh, Pennsylvania, had violated certain Civil Air Regulations in that he did not execute the missed approach procedure specified in the standard instrument approach procedure for Runway 28 at the Greater Pittsburgh Airport (J.A. 22-23). It was further alleged that petitioner violated the regulations in failing to maintain a continuous radio watch on the appro-

priate frequency (J.A. 23). A hearing was held by CAB Examiner Caldwell who found that petitioner had violated the regulations as alleged but, considering that petitioner had a clear record of over 10,000 flying hours to his credit, and inasmuch as he had flown continuously without incident during the fifteen months that had elapsed between the violation incident and the Initial Decision, stated that ". . . any suspension of respondent's airline transport pilot rating . . .. would in effect be a punishment and not of a remedial nature." (J.A. 20) The Examiner was of the further opinion that "no useful purpose" would be served by imposing a suspension of the certificate and that "the public interest at this time does not require any remedial action." (J.A. 20)

The case was appealed to the respondent Board which, on March 28, 1956, affirmed the Examiner and found that the record did not contain any evidence as to the need for a "suspension as a punitive or deterrent sanction." (J.A. 30) However the Administrator petitioned for reconsideration on the grounds that "it is the added duty of the Board" (J.A. 35) to impose adequate sanctions for violation of the regulations and that the Board did not consider whether its action would have a deterrent effect on other pilots. (J.A. 36) On reconsideration the Board agreed with the Administrator and issued its Supplemental Order suspending the petitioner's certificate for a ten day period. (J.A. 37) A Petition for Reconsideration of this Supplemental Opinion, filed on the grounds that the Board exceeded its statutory powers by issuing the penalty sanction, (J.A. 38-40) was denied by the Board but an appropriate order was issued staying execution of the suspension. (J.A. 41-43) A Petition for Review

of the Board's Order was filed under authority of Section 1006 of the Act, 49 U.S.C. 646, in the United States Court of Appeals for the District of Columbia Circuit.

The Court of Appeals affirmed the Board's Supplemental Order of Suspension in an Opinion dated May 9, 1957, holding that Section 609 of the Act conferred broad discretionary authority upon the Board and stating:

> "Nothing in the Act or its legislative history persuades us that disciplinary action for violation of regulations was intended to be the exclusive province of Section 901."

In addition, the Court held that the practice of the Board since 1938 has been to impose such suspensions and that this consistent and unchallenged administrative practice would not be overturned except for very cogent reasons. The Court was of the opinion that air safety supported this practice.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS BELOW IS IN PROBABLE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

1. The Asserted Power to Punish Under Section 609

Regardless of whether the action of the Board is termed a forfeiture, deterrent sanction, or disciplinary action for violations of Civil Air Regulations, it is still, nonetheless, a penalty. The Board itself, in a case decided shortly before the present one, carefully analyzed the nature of a suspension of an airman's certificate because of a violation of the Civil Air Regulations and *for the first time* specifically held as follows:

> "We are inclined to the view, and hold, that suspensions imposed merely to prevent and deter violations, and where requalification in one or more respects is not involved, are punitive in the constitutional sense, and are a type of 'penalty' from which immunity is provided by Section 1004(i)." *Brubaker and Olsen,* CAB Dockets SR-2168, 2169, August 2, 1954.

This, of course, conforms with a long line of federal cases and can leave little doubt that the Order herein constitutes a penalty. See *Huntington* v. *Attrill,* 146 U.S. 657, 668; *Helwig* v. *United States,* 188 U.S. 605, 611; *Brown* v. *Civil Aeronautics Authority,* 112 F. 2d 737 (C.A. 9); *Porter* v. *Montgomery,* 163 F. 2d 211 215 (C.A. 3); *Heitmuller* v. *Berkow,* 83 U.S. App. D.C. 70, 165 F. 2d 961, 962; *Lee* v. *Civil Aeronautics Board,* 96 U.S. App. D.C. 299, 225 F. 2d 950, Judge Prettyman, dissenting on another issue, 225 F. 2d 953.

Actually, Section 609 of the Act is a purely remedial statute whereby Congress has granted the Board power to "reinspect" aircraft and their components and "reexamine" airmen and, thereafter, "if the interest of the public so requires", to alter, amend, modify, suspend and revoke certificates previously issued under powers delegated in other sections of the Act. Petitioner does not contest Section 609 as a remedial provision, but questions whether it may be used to invoke penal sanctions.

It is believed that the decision below is unique in that it is apparently the first time any court has implied a penal power from statutory language which in no way contains a penalty provision or any language suggestive of punishment.

A long line of cases has consistently upheld the principle that authority to penalize will not be presumed unless the statute involved expressly provides the power. *United States* v. *200 Barrels of Whiskey*, 95 U.S. 571, 576, *Keppel* v. *Tiffin Savings Bank*, 197 U.S. 356, 362, 373, *Iselin* v. *U. S.*, 270 U.S. 245, *Campbell* v. *Galeno*, 281 U.S. 599, *Wallace* v. *Cutten*, 298 U.S. 229, *L. P. Steuart & Bro. Inc.* v. *Bowles*, 322 U.S. 398, 404.

L. P. Steuart & Bro. v. *Bowles, supra*, was a wartime case in which this Court found that the power to allocate rationed materials included the power to withhold such materials when it was established that the petitioner had used these crucial wartime goods in violation of the statute. The Court concluded that a suspension order preventing the dealer from obtaining his share of these materials was remedial in nature. It should be noted, however, that the Court expressly affirmed the principle that penalties for punitive purposes will not be implied from general words of a statute, stating at 322 U.S. 404:

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. (Citing cases) Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record."

It should be further noted that the present case is not a matter involving legislative inadvertence (Cf. *United States* v. *Weitzel*, 246 U.S. 533, 543) or the

application of the "rule of necessity". It is strictly a question of whether a penal power can be read into Section 609 by implication. Congress expressly provided for punishment of violators of the act and regulations in Sections 901 and 902. In Sections 901 and 903 the specific civil penalties and the procedures are set out including the right to a trial by jury. Both the language and the jurisdictional amount in Section 903 follow the wording of the Seventh Amendment to the Constitution. As a practical result of the decision below any holder of a certificate issued by the Civil Aeronautics Administration becomes dependent upon the whim of the Administrator for a statutory right to a trial by jury in cases where it is sought to punish such certificate holder; he has been afforded a statutory right to a jury trial, which by such interpretation is no longer his to demand. We need not remind this Court that any seeming curtailment of a right to a jury trial will be severely scrutinized. *Dimick* v. *Schiedt*, 293 U.S. 474; *District of Columbia* v. *Colts*, 282 U.S. 63.

2. Analogous Statutes as Aids in Construction

We believe the statute is clear in providing a judicial forum for penalty proceedings against alleged violators (Sections 901-903). Nevertheless, to dispel any doubts as to the legislative intention, it is appropriate to examine other enactments in related fields of government activity. See, *Boston Sand Co.* v. *U. S.*, 278 U.S. 41; and *United States* v. *C. I. O.*, 335 U.S. 106.

The most analogous law is the statute regulating the merchant marine. That act in direct language empowers the Coast Guard Commandant to suspend or

revoke certificates for specified violations. The pertinent section reads:

> "In any investigation of acts of incompetency or misconduct or of any act in violation of the provisions of title 52 of the Revised Statutes or of any of the regulations issued thereunder, committed by any licensed officer or any holder of a certificate of service, the person whose conduct is under investigation shall be given reasonable notice of the time, place and subject of such investigation and an opportunity to be heard in his own defense. The whole record of the testimony received by such investigation and the findings and recommendations shall be forwarded to the Commandant of the Coast Guard, and if that officer shall find that such licensed officer or holder of certificate of service is incompetent *or has been guilty of misbehavior, negligence, or unskillfulness, or has endangered life, or has willfully violated any of the provisions of title 52 of the Revised Statutes or any of the regulations issued thereunder, he shall,* in a written order reciting said findings, *suspend or revoke the license or certificate* of service of such officer or holder of such certificates . . ." (Italics supplied). R. S. 4450; March 3, 1911, c. 231, or Sec. 291, 36 Stat. 1167, as amended May 27, 1936, 49 Stat. 1381; 46 U.S.C.A. 239 (g).

The section pertaining to sea captains, who certainly are akin to airline captains, reads:

> "*Licenses of captains* . . . such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, incapacity, inattention to his duties, or the willful violation of any provision of this chapter . . . applicable to him." 46 U.S.C.A. 226.

The Communications Act of 1934, as amended, is equally helpful in demonstrating that the Congress is

able properly to manifest its intention of conferring punishment power. There, the Federal Communications Commission is empowered to affirm, modify, suspend, or revoke certificates in issue after notice of hearing. It specifically enumerates a detailed list of violations such as "violating any act, treaty or convention, . . . willfully damaging radio apparatus, transmitting false or deceptive signals, . . . willfully or maliciously interfering with any other communication or signal . . ." etc. 47 U.S.C.A. 303 (m).

As to violators of radio operations aboard ship the Federal Communications Commission is empowered as follows:

> ". . . If the holder of a certificate *violates* the radio provisions of the Safety Convention or the provisions of this chapter, or the rules, regulations or conditions prescribed by the Commission, and if the efficient administration of the Safety Convention or of this part so requires, the Commission, after hearing, is authorized to *modify or cancel a certificate* which it has issued . . ." (Italics supplied) June 19, 1934, 50 Stat. 195, 60 Stat. 697 as renumbered in 68 Stat. 706, 707, 47 U.S.C.A. 359.

See also, the Securities Exchange Act of 1934, 15 U.S.C. 78s, 48 Stat. 898, and the Interstate Commerce Act, Part II, Sec. 212, 49 U.S.C.A. 312, 49 Stat. 555, which specifically allow suspension where a licensee has willfully failed to comply with the Act or regulations.

Contrasting the punitive provisions of these Acts with the broad general terms of Section 609 clearly illustrates the remedial nature of that Section and emphasizes the absence of the typical statutory language that is essential in order to sustain the Board's action

in inflicting a penalty suspension for an alleged violation. See *Fong Haw Tan* v. *Phelan*, 333 U.S. 6.

Even in statutes of the merchant marine type, there is hesitancy to allow penal jurisdiction to be exercised by quasi-judicial bodies. In *Bulger* v. *Benson*, 262 Fed. 929 (C.A., 9, 1920) the Federal Supervisory Inspector filed a complaint charging that the Master of a ship was guilty of inattention to duty and had violated certain Pilot Operating Rules which caused his vessel to have a collision. After hearing, specific statutory authority was cited to sustain a fine of $50 and a suspension of the Master's license for six months. The government's argument that this was a remedial action was rejected by the Court of Appeals in holding that the statute was "penal in its nature" and that the suspension order under the procedure followed by the Government was in excess of the statutory authority. Only the $50 fine was upheld.

3. The Lack of Sufficient Standards in Section 609 When Used as a Penal Statute

Another reason for denying the power to punish under Section 609 is that it lacks an adequate criterion. There is neither an applicable uniform standard nor a limitation on the punishment. The penalty to fit the alleged violation can be tailored by the administrative agency as it sees fit. This, we suggest, is quite distasteful to a legal system which insists upon due process as its cornerstone, and certainly approaches the brink of violating constitutional safeguards. It has been repeatedly stated by this Court that legislative enactments must be construed not only to avoid the conclusion that they are unconstitutional but also to avoid grave doubts on that score. *United States* v. *Delaware*

& Hudson Company, 213 U.S. 366, 408; *United States* v. *Jin Fuey Moy,* 241 U.S. 394, 401; *Federal Trade Commission* v. *American Tobacco Company,* 264 U.S. 298, 307; *United States* v. *LaFranca,* 282 U.S. 568, 574; *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337, 352; Cf. *Crowell* v. *Benson,* 285 U.S. 22, 62; *Everson* v. *Board of Education,* 330 U.S. 1.

In Champlin Refining Company v. *Corporation Commission,* 286 U.S. 210, 240-43, this Court rejected the contention that an oil allocation statute was remedial and held that actually it was imposing additional penalties for violations of the Act. It was, therefore, held void for lack of a definite standard, quoting at p. 242, the following statement from *Connally* v. *General Construction Co.,* 269 U.S. 385, 391:

> " 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

4. The Applicability of Administrative Construction

The Court below stated that since 1938 the Board has consistently suspended airmen's certificates for violation of the regulations. There appears to be some doubt in the Board itself as to this consistency, for as late as October 18, 1955 in the Initial Decision herein the Hearing Examiner referred to his powers in remedial terms (J.A. 20-21) thus following the language

and meaning of the Board's own Rules in Air Safety Proceedings:

> "301.26 Initial Decision. (b) Where the examiner has determined that remedial action is required the examiner shall inquire of the Administrator if there is any record of previous suspensions or revocations of Respondent's certificates; whether Respondent has had any assessment of civil penalties levied on him or any previous disciplinary action for violation of air safety standards; whether proper notice thereof has been given Respondent, and request copies of any reply thereto."

Further, the question here has never previously been actually contested and argued before the Board, and it cannot reasonably be held to have decided the penal nature of a suspension for violation of regulations until *Brubaker and Olsen,* CAB Dockets No. SR-2168, 2169 (Aug. 2, 1954), quoted above. Under these circumstances no effect should be given to the so-called administrative practice. See *Anderson* v. *McKay,* 94 U.S. App. D.C. 11, 211 F. 2d 798 and, *Order of Railway Conductors* v. *Swan,* 152 F. 2d 325 (C.A. 7), aff'd. 329 U.S. 520. Only last spring this Court in *United States* v. *E. I. DuPont de Nemours & Co.,* 353 U.S. 586, 590 overruled an argument that a thirty-five year administrative practice by the Federal Trade Commission in refusing to apply Section 7 of the Clayton Act to so-called "vertical acquisitions" was persuasive as to the intent of Congress. This Court held that the question was being decided by it for the first time and that not only had the Court the duty to reconcile administrative interpretations with the policies laid down by Congress, but that the failure of the Commission to act was "not a binding administrative interpretation that Congress did not intend vertical acquisitions to

come within the purview of the Act." By the same reasoning, it is submitted that the previous actions by the Civil Aeronautics Board in suspending certificates as punishment for violations does not bind the Courts.

Certainly administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. *United States* v. *Standard Brewery,* 251 U.S. 210, 220. Moreover, the rule as to the persuasive effect of administrative practice is applicable only where the statute is ambiguous or doubtful, *Louisville & Nashville Ry.* v. *United States,* 282 U.S. 740, 757 and where an administrative agency assumes a power plainly not granted, no amount of administrative interpretation in favor of the assumed power is binding upon the courts. *Texas Pacific Ry. Co.* v. *United States,* 289 U.S. 627, 640.

In *Sanford's Estate* v. *Commissioner of Internal Revenue,* 308 U.S. 39, Mr. Chief Justice Stone stated at p. 52:

> "Administrative practice may be of persuasive weight in determining the construction of a statute of *doubtful meaning* where the practice *does not conflict with other provisions of the statute and* is not *so inconsistent with applicable decisions of the Courts* as to produce inconsistency and confusion in the administration of the law." (Italics supplied)

and further at p. 53:

> "The very purpose sought to be accomplished by judicial acceptance of an administrative practice would be defeated if we were to regard the present practice as controlling. If a practice is to be accepted because of the superior knowledge of administrative officers of the administrative needs

and convenience (citation) there is no such reason for its acceptance here."

We concede that Section 609, when viewed in its *remedial* context, grants broad general powers, but we strongly urge that it is clear and unambiguous in not providing punishment for violators. The respondent has heretofore relied on the Section 609 phrase "if the interest of the public so requires "as granting the power to punish for violations, but it has been stated by this Court that the phrase "in the interest of the public" contained in Section 411 (49 U.S.C. 491, 66 Stat. 628) of the Act is not sufficient to impute punitive powers. In *American Airlines* v. *North American*, 351 U.S. 79, 85 this Court stated,

> "*The section is not concerned with punishment of wrongdoing* or protection of injured competitors, but rather with protection of the public interest." (Italics supplied)

By the same token, Section 901, not availed of by respondent here, is unequivocal in providing penalties for such violators.

Norwegian Nitrogen Co. v. *United States*, 288 U.S. 294 the only citation in the opinion below, in petitioner's view does not affect the validity of the foregoing contentions. The full statement from which the Court quoted is at p. 315 of 288 U.S., as follows:

> "*True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction.* True it also is that administrative practice consistent and generally unchallenged will not be overturned except for very cogent reasons if the scope of command is indefinite and doubtful (citing cases)." (Italics supplied)

It is submitted there is no warrant to the assertion below that air safety is the touchstone of public policy supporting the administrative practice. No one has offered in the record or elsewhere to demonstrate the truth of this proposition, the respondent having merely relied on "the common knowledge of mankind." (Resp. Brief below, p. 29.)

It is submitted that the contrary is actually the fact. Commercial flying demands the highest degree of proficiency. It is mandatory for professional pilots to maintain their skills at their peak by constantly exercising them. Of course, the Respondent Board is fully cognizant of this important aviation axiom.

The Civil Air Regulations in several instances require *recent* flying experience in order to obtain and exercise the privileges of an airline transport pilot rating. See C.A.R. Secs. 21.16, 21.41, 21.42, 40.301; 14 C.F.R. Secs. 21.16, 21.41, 21.42, 40.301-2 (Appendix pp. 3a to 7a). In order to maintain such rating, an airline transport pilot must undergo a route familiarity examination (C.A.R. Sec. 40.302; 14 C.F.R. Sec. 40.302) at least once every twelve months, and at least each six months he must satisfactorily demonstrate his navigation, instrument, radio and other flight skills in actual flight. C.A.R. Sec. 40.302, *supra*.

Hence, the Board's present insistence that it is promoting safety by grounding experienced airmen is not only inconsistent with its own regulations, but is a misconception of its statutory powers. Clearly, the grounding of an experienced and qualified airman for any period whatsoever cannot be in the public interest.

If anything, it will tend to make a pilot less qualified—at least temporarily.[1]

This administrative anomaly can be remedied by reversing the Court below. It is probably unnecessary to add that there is an ample deterrent element (assuming, *arguendo,* that it is necessary in order to require pilots to fly safely), in imposing a pecuniary fine after full judicial process, including trial by jury, as contemplated by Congress in Sections 901-903. Indeed, the structure of the Act is such, as pointed out above, that Congress must have believed the fine would have a more incisive and more forceful deterrent effect than suspension.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Section 903 (b) (1) of the Act (49 U.S.C.A. Sec. 623 (b) (1)) details the procedure in respect to civil penalties for violation of Title VI (the authority for promulgating Civil Air Regulations). Paragraph (4) of that Section states:

> "(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law."

Reported cases of these decisions are rare and, so far as we are aware, this Court has never had occasion to

[1] The present case, involves only a 10 day suspension, but recent Board cases indicate 6 months is within its concept of the public interest. Indeed, there is no limit to the sanctions possible under Section 609, a fact that is embraced by C.A.R. 21.24(d); 14 C.F.R. 21.24(d) (App. p. ....) which authorizes *revocation* as legitimate *sanction.*

prescribe, or direct other courts to prescribe, such rules not otherwise provided by law.

The present atrophic condition of Sections 901 and 903 is a result of administrative legislation and is inconsistent with the substantial body of law that must have been anticipated by the Congress[2] in order to have induced it to provide this important provision. A glance at Titles V, VI and VII (the only parts of the Act subject to the civil penalties of Section 901) will demonstrate that this congressional foresight could be predicated only upon anticipated judicial proceedings involving any penalty for violations of the regulations promulgated under Title VI.

This premise considered, it is respectfully urged that it is of importance to that segment of the public involved in interstate and foreign air commerce that this Court consider this case to determine in what cases the holders of certificates issued by the Civil Aeronautics Administration are entitled to judicial process and a trial by jury.

Petitioner wishes finally to advise the Court that there is now pending in the United States Court of Appeals for the Seventh Circuit the case of *Hard* v. *Civil Aeronautics Board*, No. 11989 in which although there are additional considerations, the issue is similar to the issue presented herein, i.e., whether under Section 609 of the Act the respondent has the power to invoke penal sanctions by suspending an airman's certificate for violation of regulations. Oral argument is scheduled in that case for September 16, 1957.

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[2] See speech by Senator McCarran, 83 Cong. Rec. 6634 (May 9, 1938).

CONCLUSION

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SIDNEY W. WILSON, *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

No. 13553.

United States Court of Appeals
District of Columbia Circuit.

Argued April 1, 1957

Decided May 9, 1957

* * * * * *

Mr. Lloyd Fletcher, Washington, D. C., for appellant.

Mr. O. D. Ozment, Chief Litigation and Research Division, Civil Aeronautics Bd., with whom Messrs. Franklin M. Stone, Gen. Counsel, Civil Aeronautics Bd., John H. Wanner, Associate Gen. Counsel, Civil Aeronautics Bd., Gerald F. Krassa and Ulrich V. Hoffmann, Attys., Civil Aeronautics Bd., and Daniel M. Friedman, Atty., Dept. of Justice, were on the brief for respondent. Mr. Robert L. Park, Atty., Civil Aeronautics Bd., also entered an appearance for respondent.

Before BAZELON, FAHY and DANAHER, Circuit Judges.

BAZELON, Circuit Judge.

Petitioner, an airline pilot, seeks review of Civil Aeronautics Board orders which (1) suspended his airman certificate for ten days, and (2) denied reconsideration of the suspension. The single issue is stipulated to be:

> Whether, in circumstances in which the Civil Aeronautics Board does not find the pilot to be unqualified to fly, the Board is empowered under Section 609 of

the Civil Aeronautics Act[1] to suspend his airman certificate as a deterrent sanction.

Under § 609, the Board "may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or *suspend* * * * [his] airman certificate * * *, *if the interest of the public so requires* * * *." Emphasis added.

Petitioner argues that, since reexamination is a condition precedent to action under § 609, the section must be read to authorize suspension only for lack of competence or qualifications as an airman. Disciplinary action for violation of regulations, he says, is covered exclusively by § 901 of the Civil Aeronautics Act[2] which provides that a "person who violates [regulations] shall be subject to a civil penalty of not to exceed $1000 for each such violation." His view is that Congress did not authorize suspension of a certificate for disciplinary purposes. We cannot agree.

By resting suspension on a Board determination that "the interest of the public so requires," Congress conferred broad discretionary authority upon the Board. What Congress had in mind appears from the direction contained in § 601(b) of the Act[3] that the Act be administered "in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation * * *." Nothing in the Act or its legislative history persuades us that disciplinary action for violation of regulations was intended to be the exclusive province of § 901.

Moreover, the Board has never recognized such exclusivity in its administration of the Act. From the effective date of the Act in 1938 through June 30, 1956, the

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[1] 52 Stat. 1011 (1938), 49 U.S.C.A. §559.

[2] 52 Stat. 1015 (1938), 49 U.S.C.A. § 621.

[3] 52 Stat. 1007 (1938), 49 U.S.C.A. § 551.

Board has suspended approximately 4000 airmen for violation of rules, without findings that they lacked competence or qualifications and without requiring re-examination before reinstatement. This consistent and, until now, unchallenged administrative practice "will not be overturned except for very cogent reasons * * *." Norwegian Nitrogen Products Co. v. United States, 1933, 288 U.S. 294, 315, 53 S. Ct. 350, 358, 77 L.Ed 796. The most cogent of reasons—air safety—supports the administrative practice here under attack.

Affirmed.

Statutes Involved

The Civil Aeronautics Act of 1938 (52 Stat. 973) as amended, (49 U. S. C. A. 401 *et seq.*), provides in part:

Sec. 609 (52 Stat. 1011, 49 U.S.C.A. 559)

"The Board may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Administrator of Civil Aeronautics in refusing to issue to the holder of such certificate a like certificate . . . ."

Sec. 901 (52 Stat. 1015, 49 U.S.C.A. 621)

"(a) Any person who violates (1) any provision of subchapters V, VI, and VII of this chapter, or any provision of subsection (a) (1) of section 181 of this title, or (2) any rule or regulation issued by the Post-

master General under this chapter, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Board or the Postmaster General, as the case may be . . . ."

"(b) In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty . . . ."

Sec. 903 (52 Stat. 1017, 49 U.S.C.A. 623)

"(b) (1) Any civil penalty imposed under this chapter may be collected by proceedings in parsonam against the person subject to the penalty . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be re-examined other than in accordance with the rules of the common law . . . ."

"(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law."

C.A.R. 21.16, 14 C.F.R. Sec. 21.16 *Aeronautical experience.*

An applicant for an airline transport pilot rating shall hold a valid commercial pilot rating, or equivalent as determined by the Administrator, and shall meet the following aeronautical experience requirements:

(a) Applicant shall have had at least 250 hours of flight time composed of time as pilot in command, or time as copilot actually performing the duties and functions of a pilot in command under the surveillance of the pilot in command, or any combination thereof. Of this time, at least 100 hours shall have been cross-country flight time, and at least 25 hours shall have been night flight time. Flight time shown in fulfillment of the requirements of this paragraph may also be used for the purposes of paragraph (b) of this section.

(b) Applicant shall have had at least 1,200 hours of flight time as pilot within the last 8 years, of which

(1) 5 hours shall have been had within 60 days immediately preceding the date of application;

(2) 500 hours shall have been cross-country flight time;

(3) 100 hours shall have been night flight time;

(4) 75 hours shall have been instrument time under actual or simulated instrument conditions of which not less than 50 hours shall have been in actual flight.

C.A.R. 21.24, 14 C.F.R. Sec. 21.24.

(d) Nothing in this section shall be construed to deny or defeat the jurisdiction of the Federal courts, the Administrator, or the Board to impose any authorized sanction, including revocation of the certificate, for a violation of the act or of the regulations in this sub-chapter occurring during the effective period of the certificate.

C.A.R. 21.41, 14 C.F.R. Sec. 21.41 *Passenger carrying.*

A certificated airline transport pilot shall not pilot any aircraft carrying any person other than members of the crew thereof, certificated airmen carried in air carrier aircraft in furtherance of their official duties, or a certificated instructor rated for the aircraft operated, unless, within the 90 days immediately preceding, he shall have made at least 3 take-offs, and three landings to a full stop, in an aircraft of the same category (§ 21.34) and if an airplane, within the same class (§ 21.35 (a)) as that of the aircraft in which any such person is carried.

C.A.R. 21.42, 14 C.F.R. Sec. 21.42 *Recent experience requirements.*

(a) *Passenger flight (day and night).* A certificated airline transport pilot shall not pilot an aircraft carrying any person other than the members of the crew thereof, certificated airmen carried in air carrier aircraft in fur-

therance of their official duties, or a certificated instructor rated for the aircraft operated, unless within the preceding 3 calendar months he shall have made and logged at least 3 take-offs and landings to a full stop in an aircraft of the same category, class, and type as that of the aircraft in which such person is carried.

(b) *Instrument flight.* A certificated airline transport pilot, who within the preceding 6 calendar months has not flown and logged at least 2 hours of flight time solely by reference to instruments under either actual or properly simulated instrument flight conditions, shall not pilot an aircraft under such conditions until he has flown and logged at least 2 hours of such flight time accompanied by a certificated pilot of at least private grade holding an appropriate category, class, and type rating for the aircraft and authorized to operate aircraft under instrument conditions.

C.A.R. 40.301, 14 C.F.R. Sec. 40.301 *Pilot recent experience.*

No air carrier shall schedule a pilot to serve as such in scheduled air transportation unless within the preceding 90 days he has made at least 3 take-offs and 3 landings in the airplane of the particular type on which he is to serve.

C.A.R. 40.302, 14 C.F.R. Sec. 40.302. *Pilot checks.*

(a) Line check: Prior to serving as pilot in command, and at least once each 12 months thereafter, a pilot shall satisfactorily accomplish a line check in one of the types of airplanes normally to be flown by him. This check shall be given by a check pilot who is qualified for the route. It shall consist of at least a scheduled flight between terminals over a route to which the pilot is normally assigned during which the check pilot shall determine whether the individual being checked satisfactorily exercises the duties and responsibilities of pilot in command.

(b) Proficiency check: (1) An air carrier shall not utilize a pilot as pilot in command until he has satisfactorily demonstrated to a check pilot or a representative of the Administrator his ability to pilot and navigate airplanes to be flown by him. Thereafter, at least twice each 12 months at intervals of not less than 4 months or more than 8 months, a similar pilot proficiency check shall be given each such pilot. Where such pilots serve in more than one airplane type, the pilot proficiency check shall be given in the larger airplane type at least once each 12 months.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 434

SIDNEY W. WILSON, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

REPLY TO BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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In view of several assertions contained in the argument of respondent, counsel for petitioner have deemed it appropriate to file this reply brief in an effort to be of assistance to the Court in determining whether the writ of certiorari should be granted herein.

On pages 7-8 of the Brief in Opposition, respondent makes considerable point of the Congressional declaration of policy in Section 2 of the Civil Aeronautics Act of 1938 to the effect that the Board shall consider as being "in the public interest" the regulation of air transportation in such manner as to "assure the highest degree of safety."

While not denying that the respondent does indeed have the duty described, the Court's attention is respectfully directed to the declaration of Congress in Section 3 of the Act whereby the rights of individuals in aviation are likewise fully recognized by Congress. Section 3 provides:

> "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States." (Sec. 3, 49 U.S.C. 403).

Surely this declaration is equally cogent in determining the scope of the Board's powers under the "public interest" criterion.

Contrary to the assertion on page 9 of respondent's brief, petitioner strongly challenges the submitted figure of approximately 4,000 cases upon which respondent relies to show a consistent practice of imposing suspension penalties for violations. As previously stated, we read *United States* v. *E. I. Dupont de Nemours & Co.*, 353 U.S. 586, 590, as holding that administrative practice would be more persuasive as to the intention of Congress had there first been an actual contest and decision of the disputed issue by the regulatory agency. In August, 1954, the respondent Board decided that the immunity section of the Act (Sec. 1004(i)) was applicable in cases where the complaint alleged that the pilot should be suspended because he had violated Civil Air Regulations under circumstances[1] endangering lives and property. Before the

[1] The circumstances involved a mid-air collision between a United airliner and an American airliner over Michigan City, Indiana.

Board reached the conclusion that the immunity section would apply to such actions it was essential, of course, to determine whether the complaint stated a remedial or penal cause of action. The Board stated therein:

> *"No case precisely in point has been brought to our attention,* and support exists for both the views of the pilots (that such suspension is punitive) and the Administrator (that such suspension is remedial)." (Italics supplied). *Brubaker* and *Olsen*, CAB Dockets, SR-2168, 2169.

The Board not only found that the complaint was penal in character but offered to permit the Administrator of Civil Aeronautics on remand to amend the complaint if the Administrator considered remedial action proper, an offer that was never accepted. It is not denied that this was the very first time that the Board was squarely confronted with and decided this issue. The case herein followed shortly thereafter. Accordingly, the argument and authorities cited on pages 13-15 of the petition demonstrate the fallacy of any contention that weight should be accorded to the so-called administrative construction.

In discussing *Brubaker* and *Olsen*, respondent states that suspensions imposed to deter violators are "remedial in the sense that they are designed to promote safety." (Resp. Br. 12). They have failed to state, however, why this is so, and it must be quite clear by now that it can only be the so-called "deterrent effect" of such sanctions that have this design. As we earlier suggested (Pet. 16-17) such effect, if it exists at all, is at least equally present in judicial proceedings to assert a penalty. This is a procedure which avoids the unanswered question of how a penalty suspension of

a qualified pilot's license can be in the interest of the public and in the furtherance of the highest degree of safety when it, in fact, will only make him less qualified—at least temporarily.

Moreover, our understanding of the decision in *L. P. Steuart & Bro.* v. *Bowles*, 322 U.S. 398, is that the courts will not imply the power to issue a punitive suspension unless the statute expressly authorizes such power, but they will uphold orders of suspension if there is a specific finding that such orders are remedial. Respondent has made no such finding. We further submit that the holding in *Steuart* renders academic the footnote remarks of Mr. Justice Brandeis in *Helvering* v. *Mitchell*, 303 U.S. 391, 400, footnotes 2 and 3. Cf. *Wallace* v. *Cutten*, 298 U.S. 229 and *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10.

On page 10 of respondent's brief, it is stated that "the petitioner does not squarely face the question necessarily raised by this contention, namely, the circumstances under which a suspension would be purely remedial". Respondent knows full well the circumstances under which a suspension is purely remedial for in many cases decided by respondent, it has exercised its true remedial powers, without attempting to punish under Section 609, where the facts demonstrated incompetency or lack of flying efficiency. In such cases, the Board has suspended the certificate until such time as the holder has completed additional flight instruction, corrected specified deficiencies, and retaken flight tests and written examinations. See for example, *Francis C. Bethell*, 13 CAB 28; *George Law*, 13 CAB 263; *Malcolm Riess*, 13 CAB 300; *Henry Line*, 13 CAB 308; *Jack N. Neal*, Dkt. No. SR3-1563 (September 10, 1956); *Alaska Airlines, Inc.*, 13 CAB

495; *Aviation Corporation of Seattle*, 13 CAB 526; Cf. *Brown* v. *Civil Aeronautics Authority*, 112 F. (2d) 737, op. supp. 119 F. (2d) 172 (C.A. 9).

There certainly seems to be no merit in respondent's reliance on the two different standards set forth in Section 609 for suspension and revocation.* Clearly, revocation is an action of greater magnitude and due process would require a more exacting standard than the lesser temporary suspension action which might obtain at times in order to correct a deficiency not justifying revocation. In either event, it has not been made clear why the power to penalize should be implied from this Section when read in its entirety. Respondent would have this Court believe that the phrase "the interest of the public" implies the power to punish. We submit this is contrary to established principles of statutory construction as it renders superfluous the elaborate penalty provisions contained in Sections 901 and 903. In addition to the points previously made in this regard (Pet. 15-17), the Court's attention is respectfully invited to the case of *United Air Lines* v. *Civil Aeronautics Board*, 198 F. (2d) 100 (C.A. 7) where the court, in discussing the powers granted in another but similarly worded section of the Act, stated:

> "It will be noted that the power given to the Board to alter, amend, modify or suspend existing certificates is *not punitive in character*, but depends for its exercise upon the requirements of public convenience and necessity, which are the same standards under which the Board may grant certificate rights under Sec. 401(d) of the Act." (Italics supplied)

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* It is questionable whether the Board in issuing sanctions had ever considered such distinction. See Civil Air Regulation 21.24, Pet. p. 5a.

Finally, counsel wish to advise the Court that the case of *Hard* v. *Civil Aeronautics Board,* . F. (2d) , stated on page 18 of the petition to be then pending in the United States Court of Appeals for the Seventh Circuit, has now been decided by that Court. The decision in the *Hard* case is adverse to the petitioner. Counsel have been advised, however, that the petitioner in the *Hard* case contemplates filing in this Court his petition for writ of certiorari. The Court is further advised that, while the *Hard* case involves the precise question of statutory power raised herein, it also involves a constitutional issue on the question of prejudgment related to that involved in *U. S. ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 26.

It is desired to point out the status of the *Hard* case to this Court in order to demonstrate the general importance of the question involved herein as well as to indicate the probability that this Court will be asked to decide the constitutional issue of prejudgment by respondent arising in the exercise of its powers in Section 702, 49 U.S.C. 582.

For the reasons stated herein and in the petition, it is respectfully submitted that the writ of certiorari should be granted in this case of first impression.

Respectfully submitted,

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CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 1a-3a) is reported in 244 F.2d 773. The findings and orders of the Civil Aeronautics Board (R. 32-37, 41-42) [1] are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1957. The petition for a writ of certiorari was filed on September 6, 1957, pursuant to an order of Mr. Justice Black extending the time for filing to

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[1] We use the designation "R." in referring to the Joint Appendix filed in the court of appeals.

September 7, 1957. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTION PRESENTED

Whether Section 609 of the Civil Aeronautics Act, which empowers the Civil Aeronautics Board to suspend a pilot's certificate "if the interest of the public so requires", authorizes the Board to suspend the certificate of an airline transport pilot, found to have violated the Civil Air Regulations, as a deterrent sanction against violation of these Regulations.

STATUTE INVOLVED

The relevant provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U.S.C. 401, *et. seq.*, are:

AMENDMENT, SUSPENSION, AND REVOCATION OF CERTIFICATES

Sec. 609. [49 U.S.C. 559] The Authority [Administrator] may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or [the Board may] suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or [the Board] may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority [Administrator] in refusing to issue to the holder of such certificate a like certificate. In cases of emergency, any such certificate may be suspended, in whole or in part, for a period not in excess of thirty

days, without regard to any requirement as to notice and hearing. The Authority shall immediately give notice of such suspension to the holder of such certificate and shall enter upon a hearing which shall be disposed of as speedily as possible. During the pendency of the proceeding the Authority may further suspend such certificate, in whole or in part, for an additional period not in excess of thirty days.

CIVIL PENALTIES

Safety and Postal Offenses

Sec. 901. [49 U.S.C. 621] (a) Any person who violates (1) any provision of titles V, VI, and VII of this Act, or any provision of subsection (a) (1) of section 11 of the Air Commerce Act of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Authority [Administrator for violations of titles V and VI, Board for violations of title VII] or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

* * * * * *

STATEMENT

Petitioner is an airline captain employed by National Airlines (R. 20). On July 6, 1954, he was pilot-in-command of a flight scheduled to land at Greater Pittsburgh Airport. Weather conditions were such that an instrument landing was required (R. 15). The plane was duly cleared for an instrument approach on Runway 28 (R. 8), and petitioner was advised that the ceiling

was 700 feet, whereas in fact it was less than 300 feet (R. 30). Petitioner descended to 400 feet, could not see the runway, and abandoned his approach (R. 19). When a landing approach is abandoned under instrument conditions, the aircraft is required to follow a preordained flight pattern (known as a "missed approach procedure") to avoid possible collision with other aircraft. The missed approach procedure for Runway 28 requires in substance that the aircraft be flown straight ahead (almost due west) in climbing flight to an altitude of 2500 feet to a specified radio beacon approximately six miles from the approach end of the runway (R. 24), and there to obtain further clearance or instructions. Instead of following this plan, petitioner flew straight ahead for only a mile and a half and then executed a 180° left turn. He then flew east until southeast of the airport, made a right turn, and proceeded south to yet another radio beacon, all with the intention of approaching Runway 32 where landing is permitted at lower weather ceilings than on Runway 28 (R. 10, 19, 24, 33). For some two minutes after the missed approach petitioner did not respond to tower radio calls (R. 14, 15, 18, 35). After two approaches to Runway 32 by the copilot, petitioner took over and landed the plane on the third approach.

Petitioner's deviation from the missed approach procedure and his failure to maintain an appropriate radio watch were charged before the Board in a complaint by the Administrator of Civil Aeronautics under Section 609 of the Act (*supra*, pp. 2-3) as violations of the applicable Civil Air Regulations, as careless and reckless operation, and as a failure to exercise the degree of care, caution and judgment required of the holder of

an airline transport pilot rating (R. 3, 4).[2] The Administrator's complaint requested that "in the public interest, the Airline Transport Pilot Rating of [petitioner] be suspended" (R. 4).

Full proceedings followed before the Board. The examiner found the violations as charged (R. 20, 21), but concluded that no sanction should be imposed. The Board initially affirmed the examiner's decision (R. 31). On reconsideration (R. 32), the Board found itself in agreement with the Administrator's view "of the importance of imposing a suspension as a deterrent sanction in connection with our joint [Board and Administrator] responsibility for attaining the highest degree of safety in air transportation." Noting that the public interest requires an effective enforcement program, the fact that the violations were serious, and that it "is especially necessary under the current congested traffic conditions to adhere to prescribed air traffic rules and to maintain a proper radio watch," it concluded that a ten-day suspension should be imposed as a deterrent sanction in the interest of the public (R. 36, 37). The Board made no finding of incompetency or lack of flying ability on petitioner's part, and none was charged in the Administrator's complaint.

The order was challenged in the Court of Appeals on the sole ground of statutory authority. Petitioner's

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[2] The Administrator of Civil Aeronautics (Civil Aeronautics Administration) is charged with responsibility for the "policing" of the airways, and for the filing and prosecuting of complaints before the Board seeking suspension and revocation of airman certificates. See *Lee, Administrator of Civil Aeronautics* v. *Civil Aeronautics Board*, 96 App. D.C. 299, 225 F. 2d 950. An airline transport pilot rating is the type of certificate required of a pilot-in-command of a scheduled airline flight.

position was that suspension may be imposed only where there is a finding of incompetency or other lack of qualification to fly by the pilot and only until such time as that disability is removed, and that the only sanction applicable to other cases of violation is the imposition of the statutory monetary "penalties" prescribed in Section 901 of the Act (*supra*, p. 3).[3]

The court held to the contrary. It said (Pet. 2a):

> By resting suspension on a Board determination that "the interest of the public so requires", Congress conferred broad discretionary authority upon the Board. What Congress had in mind appears from the directive contained in § 601(b) of the Act that the Act be administered "in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation . . .". Nothing in the Act or its legislative history persuades us that disciplinary action for violation of regulations was intended to be the exclusive province of § 901.

The court further pointed out that the Board in its administration of the Act had imposed some 4000 suspensions for violations of the traffic rules without making findings of incompetency on the part of the pilot, and held that this consistent administrative practice should not be overturned except for very cogent reasons. The court concluded that (Pet. 3a) "[t]he most cogent of reasons—air safety—supports the administrative prac-

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[3] The function of assessing and compromising civil penalties for violation of the traffic rules is also that of the Administrator, conferred upon him by Reorganization Plans III and IV of 1940 (54 Stat. 1231, 1234). There are no criminal penalties provided for violations of the regulations here involved.

tice here under attack," and accordingly affirmed the Board's order.

ARGUMENT

Section 609 (*supra*, pp. 2-3) authorizes the Board to suspend a pilot's certificate "if the interest of the public so requires". As the court below said (Pet. 2a), Congress vested in the Board "broad discretionary authority" in applying this statutory standard. Compliance with the duly established Civil Air Regulations, including those dealing with instrument landings at airfields, is essential if the objective of these Regulations, safeguarding air travel, is to be achieved. A limited-period suspension of the certificate of a pilot who has disobeyed the Regulations is an important deterrent against noncompliance with the Regulations, and hence is in "the interest of the public". The deterrent sanction which the Board here imposed therefore comes within the express language of Section 609. In addition, the Board's application of the section is supported, if not indeed commanded, by provisions of the Act which require it to be administered so as to secure the fullest possible degree of safety in air travel.

The Act provides that when the Board issues the certificates authorized by Title VI, it shall give full consideration to the duty resting upon air carriers to perform their services "with the highest possible degree of safety in the public interest" (Sec. 601(b), 49 U.S.C. 551). It also directs the Board to exercise its powers in such a manner as will best tend to "reduce or eliminate the possibility of, or recurrence of, accidents in air transportation" *(ibid.)*. And the Act's declaration of policy defines "the public interest" as including, regulation of air transportation in such manner as to

"assure the highest degree of safety" in such transportation, and regulation of air commerce in such a manner "as to best promote its development and safety" (Sec. 2, 49 U.S.C. 402).

In the present case the Board took cognizance of the foregoing considerations. It declared in its opinion on reconsideration that "we are persuaded by the Administrator's view of the importance of imposing a suspension as a deterrent sanction in connection with our joint responsibility for attaining the highest degree of safety in air transportation" (R. 36). It said further: "The public interest in maintaining an effective enforcement program is manifest; if our safety regulations are not observed they make little contribution to the high degree of air safety in air transportation which we are charged with attaining" *(ibid.)*.

The fact that Section 901 of the Act (*supra*, p. 3) provides a civil penalty not to exceed $1,000 for violation of the provisions of Titles V, VI, and VII of the Act does not, by implication, restrict or limit the Board's power under Section 609 to suspend a pilot's certificate for violation of the Civil Air Regulations, as a deterrent sanction against like violations by the offending pilot or by others. Congress may, and frequently does, provide more than one remedy against conduct declared to be unlawful. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 694-695; *Helvering* v. *Mitchell*, 303 U.S. 391, 399. But if there were any possible doubt as to whether, under the statute, disciplinary action for violation of regulations (established to secure safety in air travel) is the "exclusive province" of Section 901, the contrary is established by long-continued and consistent administrative construction of the Act.

Seldom, if ever, has there been a more conclusive showing of such administrative construction. Petitioner has not challenged the statement by the court below (Pet. 2a-3a) that from the effective date of the Act in 1938 through June 30, 1956, the Board has suspended approximately 4,000 airmen for rules' violation, without finding lack of competence and without requiring re-examination before reinstatement, in other words, suspensions imposed as deterrent sanctions. "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons", and such practice "has peculiar weight when it involves a contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315.

There was the same practice under like statutory provisions of the predecessor statute, the Air Commerce Act of 1926 (44 Stat. 568). Section 3(f) of that Act authorized the Secretary of Commerce to provide "by regulation" for the "suspension and revocation" of airman certificates (44 Stat. 569-570). Under subdivisions (a)(5) and (b) of Section 11 of the Act (44 Stat. 574), navigation of an aircraft otherwise than in conformity with the air traffic rules subjected a person to a civil penalty of $500, to be collected by proceedings in personam against the person subject to the penalty. Thus Sections 3(f) and 11 directly corresponded, respectively, with Sections 609 and 901 of the successor statute. In addition, legislative history establishes that Congress intended that the Civil Aeronautics Act of 1938 should follow and carry forward the provisions and methods for safety regulation of the earlier stat-

ute.[4] Since the Secretary of Commerce had administered the Air Commerce Act of 1926 upon the basis that its suspension and civil-penalty provisions constituted alternate sanctions, and had so reported to Congress,[5] this construction of "the law from which the challenged statute emerged" is entitled to great weight. *United States* v. *C.I.O.*, 335 U.S. 106, 112.

Petitioner urges that Section 609 permits suspension solely by way of remedial relief. Although petitioner does not squarely face the question necessarily raised by this contention, namely, the circumstances under which a suspension would be purely remedial, he implies (Pet. 2) that suspension is permissible only if the person concerned is "unqualified to hold" a certificate as an airline transport pilot. But this is the very standard provided in Section 609 (*supra*, p. 2) for *revocation* of a pilot's certificate, namely, "any cause which, at the time of revocation, would justify the Authority [Administrator] in refusing to issue to the holder of such certificate a like certificate." The contrast between this standard, lack of qualification to hold a pilot's certificate, and the broad and flexible standard for suspension, "if the interest of the public so requires", conclusively establishes, we submit, the groundlessness of petitioner's contention as to the limited scope of the suspensions authorized by Section 609.

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[4] For example, the report of the House Interstate and Foreign Commerce Committee on H.R. 9738 (75th Cong., 3d Sess.), the companion bill of S. 3845 which became the Civil Aeronautics Act, states: "The existing methods of safety regulation are permitted to remain virtually as they are under existing law" (H. Rep. 2254, 75th Cong., 3d Sess., p. 2).

[5] Reports of the Secretary of Commerce: Sixteenth Annual Report, 28; Seventeenth Annual Report, 19; Eighteenth Annual Report, 14; Nineteenth Annual Report, 12; Twentieth Annual Report, 10.

The different statutory standards for suspensions and for revocations also make inapposite petitioner's reliance (Pet. 8-11) on what he terms "analogous statutes as aids in construction". We additionally suggest that no presently relevant conclusion can be drawn from these "analogous statutes".

Suspension for a ten-day period of an airline transport pilot's certificate upon findings, such as made here, that he had violated Civil Air Regulations under circumstances "endangering lives and property" (R. 23), is, as previously stated, squarely within the language of the applicable statutory provision, and is also in furtherance of a principal statutory objective, promotion of safety in air travel. Furthermore, Congress lawfully may sanction the enforcement of statutory obligations by providing reasonable civil penalties and conferring upon administrative officials power to impose such penalties. *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 334.

Petitioner relies upon the Board's ruling in *Brubaker and Olsen*, C.A.B. Docket Nos. S.R.-2168, S.R.-2169 (Pet. 13).[6] The proceeding involved the application of Section 1004(i) of the Civil Aeronautics Act, 49 U.S.C. 644(i), which provides that no individual shall be subjected to a "penalty or forfeiture" on account of any matter concerning which he has been compelled to testify after a claim of privilege against self-incrimination. The Board stated that suspensions imposed to "deter further violations by the offending pilot

[6] A proceeding by the Administrator of the Civil Aeronautics Board seeking review of this ruling was dismissed upon the ground that the Administrator did not have a "substantial interest" in the Board's order and therefore lacked standing to petition for review. *Lee* v. *Civil Aeronautics Board*, 225 F. 2d 950 (C.A.D.C.).

and by others" are "remedial in the sense that they are designed to promote safety", but also are "disciplinary in character", and for this reason constitute a type of civil "penalty" for which Section 1004(i) provides immunity.

The premise of the *Brubaker and Olsen* ruling, that Section 609 authorizes suspensions imposed as deterrent sanctions, is directly contrary to petitioner's contention here. The validity of this application of the section is not affected by the fact that the section may not be enforced against one who has claimed and been granted the privilege against self-incrimination. Forfeitures and other civil sanctions of severity are not "essentially criminal", and are not rendered such by the fact that they may support a claim for the constitutional guaranty against compulsory self-incrimination. *Helvering* v. *Mitchell*, 303 U.S. 391, 400.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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